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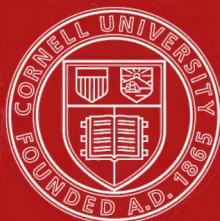
Rights, remedies, and practice, at law,

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RIGHTS, REMEDIES, AND PRACTICE.

RIGHTS, REMEDIES,
AND
PRACTICE,
AT LAW, IN EQUITY, AND UNDER THE CODES.
A TREATISE ON
AMERICAN LAW
IN CIVIL CAUSES;
WITH
A DIGEST OF ILLUSTRATIVE CASES.

BY
JOHN D. LAWSON,
AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS,
USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

VOL. III.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
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PREFACE.

IN this volume the second division of the work — Personal Rights and Remedies — commences. Under this division are included the titles, Torts in General, Torts in Domestic Relations, Conspiracy, Assault and Battery, False Arrest and Imprisonment, Malicious Prosecution, Negligence, and Slander and Libel.

On page 2383 the third division—Property Rights and Remedies—begins; and three titles of this division, viz., Personal Property in General, Animals, and Ships and Shipping, will be found in this volume. The remaining titles of this extensive division will be contained in the succeeding three volumes.

J. D. L.

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§ 1039. Remedy by action.

§ 1040. Who are responsible — Infants, married women, corporations, lunatics.

§ 1041. Joint wrong-doers — Participation — Ratification.

§ 1042. Liability of plaintiff in writ for acts of officers.

§ 1043. Liability of officer for acts of deputies.

§ 1044. Intentional wrong-doers — Liable jointly and severally.

§ 1045. No contribution among wrong-doers — Exceptions.

§ 1046. Joint wrong-doers — Injury sustained by one.

§ 1009. **Tort Defined.** — A tort is a wrong independent of contract.¹

§ 1010. **Intent in Tort.** — A wrong intent is not essential to liability. One injuring another is liable in damages without regard to the intention with which the act was done.² An act intended, but not accomplished, gives no right of action.³ An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.⁴

¹ This is the definition given in the English Common Law Procedure Act of 1852.

² *Amick v. O'Hara*, 6 Blackf. 258; *Bruch v. Carter*, 32 N. J. L. 554; *Cate v. Cate*, 44 N. H. 211; *Dexter v. Cole*, 6 Wis. 319; 70 Am. Dec. 465; *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 27; *Lincoln v. Buckmaster*, 32 Vt. 652; *Howe v. Young*, 16 Ind. 312; *Tally v. Ayres*, 3 Sneed, 677. See *Shippen v. Bowen*, 4 McCrary, 59.

³ *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340; *Sheple v. Page*, 12 Vt. 519; *Jones v. Baker*, 7 Cow. 445; *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172; *Herron v. Hughes*, 25 Cal. 555.

⁴ *Parke, B.*, in *Stevenson v. Newnham*, 13 Com. B. 285; *Auburn Plank Road Co. v. Douglass*, 9 N. Y. 144; *Occum Co. v. Sprague*, 34 Conn. 529; *Chatfield v. Wilson*, 28 Vt. 49; *Smith v. Bowler*, 2 Disn. 153; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599; *Payne v. R. R. Co.*, 13 Lea, 507; 49 Am. Rep. 666, the court saying: "The question, then, is: Is an act, not unlawful, rendered actionable to the one suffering injury there-

from because it is committed willfully, wickedly, and maliciously, and in pursuance of a conspiracy to inflict the injury suffered? Does one render himself liable in damages for maliciously and wickedly exercising his rights, or denouncing his intention of so doing, if thereby he injures another? The cases relied on by plaintiff, cited by Mr. Addison in his work on torts, sections 20 and 22, where tenants were driven away from holdings, scholars frightened from school, persons prevented from trading at one's store or with his vessel, buyers and workmen driven from a quarry, do not serve as precedents, for the reason that in all of them the defendants either committed or threatened unlawful acts. In most of them, violence was used or menaced; in some, statutory misdemeanors were committed; in others, fraud, duress, or libel was resorted to. This relieved the cases of the difficulty or doubt which exists in this, where there is no libel, violence, or broken statute. In section 40, however, Addison declared broadly that 'every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it

So it has been held that no action would lie for maliciously conspiring; as, insurance officers to refuse insur-

is a tort, and may be made the foundation of an action.' Upon this plaintiff relies; and if this broad statement contains a correct exposition of the law, they are right, and the demurrer should be overruled; for the declaration abounds in charges of malice and wrong. But is this the law? To answer this correctly, it must first be understood what is meant by 'malicious act.' In common parlance, it is an act proceeding from hatred or ill-will, or dictated by malice, or done with wicked or malicious intentions or motives. But surely this cannot be the sense in which the phrase is employed by Addison; for if it were, then my neighbor would be liable to me if from ill-will or wicked motive he refused to let me get water at his spring, or to make a road for myself across his farm, or locked his pump or his gate against me, or built a fence on his own land across my path, or built his store, or shop, or a high fence, on his own land, in such close proximity to my windows as to exclude light and view, or digged on his lot below the foundation of my house, thus endangering it. It is unreasonable that actions should be maintained for any of these things. For though my neighbor is causing me hurt, and that, too, from wicked motives, and is thus violating the moral law, he is only exercising his undoubted right to use his own for himself, and deny me all privilege in it; and this the law does not punish, as has often been ruled in courts of the highest character: *Story v. Odin*, 12 Mass. 157; 7 Am. Dec. 46; *Mahan v. Brown*, 13 Wend. 261; 28 Am. Dec. 461; *A. & C. P. R. Co. v. Douglass*, 9 N. Y. 447; *Lasala v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220; 7 Am. Dec. 57. Judge Cooley, in his work on torts, page 278, says: 'It is a part of every man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons, neither the public nor third persons have any

legal concern.' And again, on page 688: 'The exercise by one of his legal right cannot be a legal wrong to another. . . . Whatever one has a right to do, another can have no right to complain of.' This he considers a mere truism. Baron Parke said, in *Stevenson v. Newnham*, 13 Com. B. 285: 'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.' And Judge Black, in *Jenkins v. Fowler*, 24 Pa. St. 308, declares: 'Any transaction which would be lawful and proper if the parties were friends cannot be made the basis of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart.' Judge Cooper, in accordance with these views, has declared, in *Macy v. Childress*, 2 Tenn. Ch. 442: 'It is no defense to a legal demand, instituted in the mode prescribed by law, that the plaintiff is actuated by improper motives. The motive of a suitor cannot be inquired into. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings.' The question was ably argued and received elaborate consideration in the supreme court of Maine in the recent case of *Heywood v. Tillson*, 46 Am. Rep. 373, wherein it was decided, without dissent, that no action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting. It would be unendurable that our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act. It is suggestive of the days of 'constructive treason.' Upon both reason and authority, therefore, it is clear that the phrase 'malicious act' cannot be used by Mr. Addison in this connection in the popular signification as understood and applied by the referees in this case; or if so used by him, it is not a correct statement of the law. In another sense, it is correct. Professor Greenleaf, in his second volume on

ance on the plaintiff's property;¹ or for maliciously collecting the notes of a bank and presenting them for redemption;² or for maliciously adopting a trade-mark to the prejudice of a plaintiff who has no exclusive right to appropriate it;³ or for throwing open one's land to the public, so that they may pass over it, thereby avoiding a toll-gate;⁴ or for maliciously throwing down fences put up through one's land to mark the lines of a road which has never lawfully been laid out.⁵

ILLUSTRATIONS. — The plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence, near to and in front of the plaintiff's windows, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her house uninhabitable. *Held*, that the action would not lie: *Mahan v. Brown*, 13 Wend. 261; 23 Am. Dec. 461. Plaintiff had been publishing directories, and intended to publish another; defendant went to persons who had advertised in plaintiff's directories, and represented that plaintiff had gone out of business, and thereby procured advertisements from these persons for a directory

evidence, section 453 (2), thus defines a malicious act: 'In a legal sense, any unlawful act, done willfully and purposely to the injury of another, is, as against that person, malicious.' To determine, then, whether a malicious act is wrongful in the legal sense, and therefore actionable, we must first determine whether it is unlawful. But if unlawful and injurious, it is actionable, irrespective of the motive; and whether malicious or not, if not unlawful and injurious, then it is not actionable, even though malicious and wicked."

¹ *Hunt v. Simonds*, 19 Mo. 583; *Orr v. Insurance Co.*, 12 La. Ann. 255; 68 Am. Dec. 770.

² *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. The discredit cast on state scrip by the state's illegal refusal to receive it for taxes affords no actionable injury to a holder whose tender has not been refused, or who owes no taxes: *Hagood v. Southern*, 117 U. S. 52.

³ *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599.

⁴ *Auburn etc. R. R. Co. v. Douglass*, 9 N. Y. 444, 450, the court saying: "Independent of authority, if a malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is the principle to stop? For instance, if a man sets up a trade, not with a view to his own profit, but solely to injure one already in the same trade, how can the case be distinguished in principle from this? So if one compels his debtor to pay, not because he wants money, but that the latter may call upon his debtor and thus ruin him; or if one who holds stock in an incorporated company, with a view to depreciate the stock and thus injure some other holder, throws his stock upon the market and sells at a great sacrifice, — would not these cases fall within the same principle? And yet no one would contend that an action would lie in these or similar cases."

⁵ *Fowler v. Jenkins*, 23 Pa. St. 176; *Jenkins v. Fowler*, 24 Pa. St. 303.

which he published and sold. *Held*, no legal cause of action: *Dudley v. Briggs*, 141 Mass. 582; 55 Am. Rep. 494. Defendant's employers refused to accept an order by him to pay his wages to plaintiff, but nevertheless did pay for some time, when they notified plaintiff that they would do so no longer, and made payment to defendant. *Held*, that the receipt of the wages by defendant was not a tort for which he was liable to plaintiff: *McGuire v. Kiveland*, 56 Vt. 62.

§ 1011. **Injury and Damage must Concur.** — A wrong committed by the defendant, and damage suffered therefrom by the plaintiff, must both concur to entitle the latter to his action.¹ But in many cases, from the commission of the wrong the law implies damage, and the plaintiff is not obliged to show it.² "Damage in the sense of the law may arise out of injuries to the person or to the property of the party, as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus for injuries to his health, liberty, or reputation, or to his rights of property, personal or real, the law has furnished the appropriate

¹ *R. v. Pagham*, 8 Barn. & C. 362; That an act was wrongful does not render it actionable; there must be an injury resulting from it to the plaintiff or a benefit to the wrongdoer: *Morgan v. Bliss*, 2 Mass. 111; *McEndree v. Piles*, 6 Litt. 101; *Nichols v. Valentine*, 36 Me. 322.

² *Embrgy v. Owen*, 6 Ex. 353; *Ashby v. White*, 2 Ld. Raym. 968; *Clifton v. Hooper*, 6 Q. B. 468; *Blanchard v. Baker*, 8 Greenl. 253; 23 Am. Dec. 504; *Whittemore v. Cutter*, 1 Gall. 429, 483; *Johns v. Stevens*, 3 Vt. 308; *Ripka v. Sergeant*, 7 Watts & S. 9; 42 Am. Dec. 214; *Gladfelter v. Walker*, 40 Md. 1; *Webb v. Manufacturing Co.*, 3 Sum. 189, Judge Story saying: "From my earliest reading, I have considered it laid up among the very elements of the common law, that whenever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it, and if no other injury is established, the party injured is entitled to a verdict for nominal damages. *A fortiori*, this doctrine applies where there is not

only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him."

remedies. The former are violations of the absolute rights of the person from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver or prove his right or interest in the property or thing affected before he can be deemed to have sustained damages for which an action will lie."¹

§ 1012. **Damnum absque Injuria — Lawful Exercise of One's Right.** — The lawful exercise of one's own rights cannot make one liable for its injurious effect on another. It is *damnum absque injuria* if through the lawful and proper exercise by one man of his own rights a damage results to another, even though he might have anticipated the result and avoided it. That which is right and lawful for one man to do cannot furnish the foundation for an action in favor of another.² No action lies for excluding a man from his wife's funeral upon the premises of the defendant;³ nor by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting;⁴ nor for eating a portion of some meat furnished by a dealer, but not paid for, and returned, so far as unimpaired, on account of a disagreement as to the price;⁵ nor for the posting of a malicious notice by an employer forbidding his employees to trade with the defendant;⁶ nor against a witness for

¹ Nelson, C. J., in *Hutchins v. Hutchins*, 7 Hill, 105.

² Cooley on Torts, 81; *Aldred's Case*, 9 Co. Lit. 58 b; *Acton v. Blundell*, 12 Mees. & W. 350; *Chasemore v. Richards*, 2 Hurl. & N. 168; 7 H. L. Cas. 749; *New River Co. v. Johnson*, 2 El. & E. 435; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; 11 Pet. 420; *Roath v. Driscoll*, 20 Conn. 533; 52 Am. Dec. 352; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721.

³ *Neilson v. Brown*, 13 R. I. 651; 43 Am. Rep. 58.

⁴ *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373.

⁵ *Finch v. Brian*, 44 Mich. 517.

⁶ *Payne v. R. R. Co.*, 13 Lea, 507; 49 Am. Rep. 666, the court saying: "Plaintiff appeals with confidence to the legal maxim, There is no wrong without its remedy. Far be it from us to shake the public and professional confidence in this venerable maxim of the English common law; . . . but as it is a legal maxim, it must be taken

giving false evidence in a case,¹ until he has been convicted of perjury;² nor for having suborned a witness to swear falsely, whereby a judgment was unjustly obtained;³ nor against his adversary for a false oath before an auditor, though it secured him a favorable judgment;⁴ nor for citing plaintiff to attend the taking of defendant's deposition to be read on the trial of an action between the parties, where defendant failed to appear and give the deposition, and plaintiff was put to useless expense by attending;⁵ nor for receiving and assisting a debtor who has escaped from an officer who has arrested him on a *ca. sa.*;⁶ nor for money expended in a successful defense

in a legal sense. So taken, obviously, it can mean no more than that there is a legal remedy for every legal wrong, i. e., every injury suffered of an unlawful act, or a lawful act done in an unlawful manner. Neither is shown here. Defendants have merely warned their employees not to trade with plaintiff; if they do, they must give up their employment. They had the right to discharge them on this ground; it was not wrong, but highly proper, to give the employees notice of the intention of the company. The manner of giving the warning was not unlawful. The posted notice contained no word of libel or reproach upon the character of plaintiff; no charge or insinuation that he was unfair in his dealings. Omitting any attack on plaintiff's character as a man or trader, defendants, in the usual manner, told its employees to stop trading with plaintiff, or to quit working for them. The common law does not forbid such an act, nor has it been made unlawful by statute, as has been done in some of the states, and probably in England. No legal wrong has been done; therefore, there is no legal remedy. Courts administering the civil law cannot punish sin or wickedness, unless it be committed in violation of the civil law, which is the measure of their jurisdiction. Nor will the maxim, *Sic utere tuo ut alienum non lædas*, aid the plaintiff in his con-

tention. As commonly translated, 'So use your own as not to injure another's,' it is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed, generally, to easements and servitudes. But strictly, even then it can mean only, 'So use your own that you do no legal damage to another's.' Legal damage, actionable injury, results only from an unlawful act; and paraphrased, means no more than, 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act.' A majority of the court, therefore, conclude that the act done, i. e., the publication of the notice that the company would discharge employees who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and though done wickedly and maliciously, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner."

¹ *Grove v. Brandenburg*, 7 Blackf. 234.

² *Page v. Camp, Kirby*, 7.

³ *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; 3 Am. Dec. 469; *Taylor v. Bidell*, 65 Cal. 489; *Stevens v. Rowe*, 59 N. H. 578; 47 Am. Rep. 231.

⁴ *Curtis v. Fairbanks*, 16 N. H. 542.

⁵ *Felth v. Davis*, 49 Vt. 151.

⁶ *Seehorn v. Darwin*, 1 Treadw. Const. 196; 3 Brev. 282.

against an indictment or action;¹ nor for false representations to a justice of the peace, whereby he was induced to marry an infant, and was prosecuted and fined therefor;² nor against a judgment creditor for an injury caused by the manner in which the officer executes the writ of execution;³ nor against an obligee for detaining the bond after it is paid;⁴ nor for obtaining a decree in chancery by means of false and forged evidence;⁵ nor to recover back an unreasonable amount of costs which have been taxed and paid.⁶ An arbitrator is not liable to an action by one party for fraudulently conspiring with the attorney of the other party to induce the other arbitrators to join him in an unjust award; but the attorney is liable, although the judgment on the award remains unreversed.⁷

An action of trespass or case will not lie by one who has been disturbed in a nocturnal interview in the woods with a female;⁸ nor is a railroad conductor permitting a passenger to travel on his train with stolen goods, and then escape, liable to the owner;⁹ nor is an owner of land liable in damages because the branches of one of his trees overlays his neighbor's land.¹⁰ A church sexton who refuses to stop the ringing of the church bell for the usual services is not liable to a person suffering from sunstroke in an adjacent house, who is thrown thereby into convulsions, which retard his recovery.¹¹ A person who, by false representations that he is qualified to serve civil process, induces another to commit a writ to him for service is not liable to an action for neglecting to serve it.¹² An

¹ *Fleet v. McIntire*, 1 N. J. L. 161; *Taylor v. Wilson*, 1 N. J. L. 362. See *Malicious Prosecution*, *post*.

² *Harvey v. Bush*, 3 N. J. L. 975.

³ *Beaumont v. Duan*, 4 N. J. L. 106.

⁴ *Winants v. Denman*, 2 N. J. L. 124.

⁵ *Peck v. Woodbridge*, 3 Day, 30.

⁶ *Allen v. Hickson*, 6 N. J. L. 409.

⁷ *Hoosac Tunnel Dock etc. Co. v.*

O'Brien, 137 Mass. 424; 50 Am. Rep. 323.

⁸ *Lakin v. Gun, Wright*, 14.

⁹ *Randlette v. Judkins*, 77 Me. 114; 52 Am. Rep. 747.

¹⁰ *Countryman v. Lighthill*, 24 Hun, 405.

¹¹ *Rogers v. Elliott*, 146 Mass. 349.

¹² *Whitney v. Blanchard*, 2 Gray, 208.

unwarranted interference between contracting parties will not create a cause of action, unless actuated by fraud or malice.¹

ILLUSTRATIONS. — The defendants, after a will had been made and executed devising certain real estate to A, conspired with each other to induce the testator to revoke it, and effected their object by means of false and fraudulent representations. *Held*, that A could not maintain an action, as the revocation of the will merely deprived him of an expected gratuity, and did not interfere with any of his rights: *Hutchins v. Hutchins*, 7 Hill, 105. A sheriff was induced, by defendant's misrepresentations, to accept a check instead of cash for property sold on execution, and on failure to pay over in cash, was imprisoned for contempt. *Held*, that he could not recover damages from defendant on the ground that the latter's fraudulent conduct induced him to violate his duty: *McLendon v. Harrell*, 67 Ga. 440. Shortly after A had commenced the erection of a house in the town of G., the town authorities passed an ordinance declaring it a nuisance to erect buildings of a certain character in certain portions of the town, and the provisions of the ordinance included A's house. In an action by A against B, the mayor of the town of G., to recover damages for preventing A from erecting the house, *held*, that the defendant was not liable: *Privett v. Whitaker*, 73 N. C. 554. A railroad company made a rule that draymen should not enter its warehouse, but should receive goods from the platform, whereupon a drayman's employer discharged him. *Held*, that the drayman had no right of action against the railroad company: *Donovan v. R. R. Co.*, 64 Tex. 519. An administrator brought an action against a railroad company for negligently running over and mutilating the dead body of his intestate, and for the destruction of the wearing apparel in which it was clad. *Held*, that for the running over and mutilation there was no right of action, but that for the destruction of the wearing apparel a right of action existed: *Griffith v. R. R. Co.*, 23 S. C. 25; 55 Am. Rep. 1. The proprietor of a theater advertises the price of reserved seats for certain performances; he afterwards refuses to sell certain seats demanded. *Held*, that he is not liable to an action: *Pearce v. Spalding*, 12 Mo. App. 141.

§ 1013. **Accident.**—A person is not liable for an accidental injury.² Where an accident happens entirely

¹ *McCann v. Wolff*, 23 Mo. App. 447.

² *Cooley on Torts*, 80; *Brown v. Ken-*

dall, 6 Cush. 292; *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 133; *Lehigh Bridge Co. v. Lehigh Coal Co.*,

from a superior agency, and without default on the part of the defendant, or blame imputable to him, an action for injury resulting from such accident is not maintainable.¹ An accident is defined as an event happening unexpectedly and without fault. Thus one is not liable who drives against another by getting on the wrong side of the road in a dark night,² or by pulling the wrong rein by mistake.³ So one is not liable for an accident or injury to person or property caused by his horse while unmanageable or running away without his fault.⁴ A person whose pistol goes off by accident and injures another is not liable therefor.⁵ The owner of a steam-boiler operated upon his own premises in a lawful manner is not

4 Rawle, 9; 26 Am. Dec. 111; Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145; Bizzell v. Booker, 16 Ark. 308; Norris v. Litchfield, 35 N. H. 271; 69 Am. Dec. 546; Gault v. Humes, 20 Md. 297; Robinson v. R. R. Co., 32 Mich. 322; Toledo etc. R.R. Co. v. Daniels, 21 Ind. 162; Indianapolis etc. R. R. Co. v. Truitt, 24 Ind. 162; P. C. & S. R. Co. v. Smith, 26 Ohio St. 124; Burton v. Davis, 15 La. Ann. 448; Brown v. Collins, 53 N. H. 442; 16 Am. Rep. 372; Hanlon v. Ingram, 3 Iowa, 81; Morris v. Platt, 32 Conn. 75; Weaver v. Ward, Hob. 134; Gibbons v. Pepper, 1 Ld. Raym. 38; Lloyd v. Ogleby, 5 Com. B., N. S., 667; Cotton v. Wood, 8 Com. B., N. S., 566; Hammack v. White, 11 Com. B., N. S., 588; Alderson v. Waistell, 1 Car. & K. 357; Holmes v. Mather, L. R. 10 Ex. 261; 16 Am. Rep. 384; Dygert v. Bradley, 8 Wend. 469; Losee v. Buchanan, 51 N. Y. 476; 10 Am. Rep. 623; Clark v. Foot, 8 Johns. 421; Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 569; Wilson v. Rockland Mfg. Co., 2 Harr. (Del.) 67; Spencer v. Campbell, 9 Watts & S. 32; Boynton v. Rees, 9 Pick. 527; Rockwood v. Wilson, 11 Cush. 221; Toledo etc. R. R. Co. v. Jones, 76 Ill. 311; Chicago etc. R. R. Co. v. Jacobs, 63 Ill. 178; Strouse v. Whittlesey, 41 Conn. 559. The old law was more severe: See article of Judge Holmes in American Law Re-

view, January, 1880; and see Jennings v. Fundeburg, 4 McCord, 161. There are some cases where a person is an insurer, and the question of negligence or care becomes irrelevant in deciding his responsibility; thus, for example, a common carrier, an innkeeper, the keeper of dangerous animals, the keeper of dangerous articles; so where the accident results from the doing of a wrongful act. These topics and liabilities are discussed elsewhere in this work. See Titles Bailments, Animals, Negligence; and see Assault, *post*.

¹ Gault v. Humes, 20 Md. 297; Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145; Harvey v. Dunlop, Hill & D. 193. Where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part: Burton v. Davis, 15 La. Ann. 448.

² Leame v. Bray, 3 East, 593.

³ Wakeman v. Robinson, 1 Bing. 213.

⁴ Brown v. Collins, 53 N. H. 442; 16 Am. Rep. 372; Holmes v. Mather, 16 Am. Rep. 384; Vincent v. Stinehour, 7 Vt. 62; 29 Am. Dec. 145.

⁵ Sutton v. Bennett, 114 Ind. 243.

liable, without proof of negligence, to an adjoining owner for damage done to his property by reason of an accidental explosion of such boiler.¹ The owner of property which, without his consent, is carried by flood or storm down a stream, and deposited upon the lands of another, is not liable for any damage occasioned, unless he reclaim the property.² Encamping and hunting upon the public lands in a "wilderness" district is not such an illegal and mischievous act as will render the person responsible for all injury that may result to others, regardless of diligence, care, or prudence on his part to prevent such injury.³

§ 1014. **Public Injury.** — For an injury which the party complainant suffers only as the rest of the public suffer, — that is, for a public injury as distinct from a private one, — the law gives no right of action.⁴ But if he suffers special injury, — that is, over and above what the public suffer, — then, though the act is also a crime, he has a remedy for damages.⁵ "Nor is it any objection to private actions that several may suffer special injuries from the same public offense. If many persons receive a private injury from a public nuisance, every man shall have his action, the test in each case being, not the

¹ *Losee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623. But see *Wilson v. City of New Bedford*, 103 Mass. 261; 11 Am. Rep. 352; and *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184.

² *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569; *Livezey v. Philadelphia*, 64 Pa. St. 106; 3 Am. Rep. 578.

³ *Bizzell v. Booker*, 16 Ark. 308.

⁴ *Cooley on Torts*, 88; *Gates v. Blincoe*, 2 Dana, 158; 26 Am. Dec. 440; *Crommelin v. Coxe*, 30 Ala. 318; 68 Am. Dec. 120; *Seely v. Bishop*, 19 Conn. 128; *Baxter v. Winooski & Co.*, 22 Vt. 114; 52 Am. Dec. 84; *Venard v. Cross*, 8 Kan. 248; *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89; *Cole v. Sprowl*, 35 Me. 161; 56 Am. Dec. 696; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Crook v. Pilcher*, 61 Md.

510; *Powell v. Beniger*, 91 Ind. 64; *Morini v. Graham*, 67 Cal. 130.

⁵ *Cooley on Torts*, 89; *Burrows v. Pixley*, 1 Root, 362; 1 Am. Dec. 56; *Marnot v. Stanley*, 1 Man. & G. 568; *Shulte v. Transfer Co.*, 50 Cal. 592; *Abbott v. Mills*, 3 Vt. 521; 23 Am. Dec. 222; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160; *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 62; *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123, and note; *Cole v. Sprowl*, 35 Me. 161; 56 Am. Dec. 696; *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Enos v. Hamilton*, 27 Wis. 256; *Houck v. Wachter*, 34 Md. 265; 6 Am. Rep. 332; *Colburn v. Ames*, 52 Cal. 385; 28 Am. Rep. 634.

number injured, but the special and personal character of the injury. A person may dam a navigable stream so as to ruin it as a highway, and in so doing may injure the several millers who were accustomed to make use of its water for operating their machinery. However numerous these millers may be, they do not in the aggregate constitute the public; and, in a legal sense, neither the public nor any other individual is concerned with the special damage which each of their number sustains."¹

§ 1015. **When Tort also a Crime.** — In England, when the act causing the injury is also an offense against the criminal law, the offense must first be prosecuted before the offender can be sued. "The law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict, either of acquittal or conviction, a civil action may be maintained."² But this is not required in the United States; the civil suit and the criminal prosecution may go on together, or the one may be brought without the other.³ In an action to recover the

¹ Cooley on Torts, 87; citing *Ashby v. White*, 2 Ld. Raym. 938; *Henley v. Lyme Regis*, 5 Bing. 91; 3 Barn. & Adol. 77; *Nicholl v. Allen*, 1 Best & S. 936; *McKinnon v. Penson*, 8 Ex. 319; *King v. Richards*, 8 Term Rep. 634. And see *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89.

² *Crosby v. Leng*, 12 East, 407.

³ *Hyatt v. Adams*, 16 Mich. 180; *Foster v. Com.*, 8 Watts & S. 77; *Blassingame v. Graves*, 6 B. Mon. 38; *Hepburn's Case*, 3 Bland, 114; *Allison v. Bank*, 6 Rand. 204; *Ballew v. Alexander*, 6 Humph. 433; *Quimby v. Blackey*, 63 N. H. 77; *Nowlan v. Griffin*, 68 Me. 235; 28 Am. Rep. 45, the court saying: "In *Boody v. Keating*, 4 Me. 164, and again in *Crowell v. Merrick*, 19 Me. 392, the court say that the rule that a civil action in behalf of the party injured

is suspended until a criminal prosecution has been commenced and disposed of, 'is limited to larcenies and burglaries.' The same opinion had before been expressed in *Boardman v. Gore*, 15 Mass. 331. In *Boston etc. R. R. Co. v. Dana*, 1 Gray, 83, where the defendant had made himself comparatively rich by stealing from the railroad company, the question was fully examined, and the court held that while it is undoubtedly the law in England that the civil remedy of the party injured by a felony is suspended till after the termination of a criminal prosecution against the offender, such had never been the law here. And such is the prevailing opinion in this country: *B. & W. R. R. Co. v. Dana*, 1 Gray, 83; *Pettingill v. Riedout*, 6 N. H. 454; 25 Am. Dec. 473; *Piscataqua Bank v. Turnley*, 1

value of property alleged to have been stolen from the plaintiff by the defendant, it is held that the right of action is not suspended until the determination of a criminal prosecution against the offender.¹ But a homicide resulting from a collision of trains is *prima facie* felonious within a statute declaring that if the injury amounts to a felony, the person injured must concurrently or previously prosecute therefor, or allege a good excuse for failure to prosecute.²

§ 1016. Action for Causing Death — No Action at Common Law. — No action lay at common law for causing the death of a human being.³ The act which caused the death might be the subject of an action, but not the death itself. Thus an action would lie by a parent or master for an injury to a child causing its death for the loss of service during the time between the receiving of the injury and its death, and also for medical attendance, expenses of nursing, etc., during that time.⁴ An action at common law by a husband for the loss of his wife, by the careless and negligent act of a third party, could be sustained, where some period intervened between the time of the injury and the time of dissolution, during which he could be said to have suffered the loss of her services and society, and incurred expenses and undergone anxiety

Miles, 312; Cross v. Guthery, 2 Root, 90; 1 Am. Dec. 61; Patton v. Freeman, 1 N. J. L. 113; Hepburn's Case, 3 Bland, 114; Allison v. Farmers' Bank, 6 Rand, 223; White v. Fort, 3 Hawks, 251; Robinson v. Culp, 1 Const. (S. C.) 231; Story v. Hammond, 4 Ohio, 376; Bal-
lew v. Alexander, 6 Humph. 433; Lofton v. Vogles, 17 Ind. 105; Boardman v. Gore, 15 Mass. 331; Howk v. Minnick, 19 Ohio St. 462; 2 Am. Rep. 413.

¹ Howk v. Minnick, 19 Ohio St. 462; 2 Am. Rep. 413.

² Western etc. R. R. Co. v. Sawtell, 65 Ga. 235.

³ Baker v. Bolton, 1 Camp. 493; Higgins v. Butcher, Yel. 89; Carey v. R. R. Co., 1 Cush. 475; 48 Am. Dec. 616; Hubgh v. R. R. Co., 6 La. Ann. 495; 54

Am. Dec. 565; Shields v. Yonge, 15 Ga. 349; 60 Am. Dec. 698; Long v. Morrison, 14 Ind. 595; 77 Am. Dec. 73; Edgar v. Castello, 14 S. C. 20; 37 Am. Rep. 714; Chicago etc. R. R. Co. v. Schroeder, 18 Ill. App. 328; Holland v. R. R. Co., 144 Mass. 425. This principle is so well settled that the numerous cases in which it is laid down need not be cited: See 2 Thompson on Negligence, p. 1272, sec. 72, where the authorities are collected; but see Sullivan v. R. R. Co., 3 Dill. 334; Cutting v. Seabury, 1 Sprague, 522.

⁴ Osborn v. Gillett, L. R. 8 Ex. 88; Covington etc. R. R. Co. v. Packer, 9 Bush, 455; 15 Am. Rep. 725; Hyatt v. Adams, 16 Mich. 180.

and distress on her account.¹ So where a passenger is negligently killed by a railroad company his personal representatives could sue for the damage to his personal estate arising in his lifetime, from medical expenses, and loss to his business by his inability to attend to it.²

§ 1017. **The Statutory Remedy.**—But a statute in England, known as Lord Campbell's act,³ entitled "An act for the purpose of compensating families of persons killed by accidents," reciting that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such cases shall be answerable in damages for the injury so caused by him," provided that an action should be maintainable against a person causing the death of another through a wrongful act, neglect, or default, and though it was a felony; the action to be for the benefit of the wife, husband, parent, and child, and to be brought in the name of the executor or administrator within twelve months after the death. Similar statutes exist, with some difference of detail, in most of the states.⁴ The statutes are remedial in their nature, and should be liberally construed.⁵ They include corporations causing the death, as well as natural persons;⁶ and the statutes apply to marine torts, and to suits against

¹ *Green v. R. R. Co.*, 28 Barb. 169; *How. Pr.* 230; *Eden v. R. R. Co.*, 14 B. Mon. 204; *Lucas v. R. R. Co.*, 21 Barb. 245.

² *Bradshaw v. R. R. Co.*, L. R. 10 Com. P. 189.

³ 9 & 10 Vict., c. 93.

⁴ The statutes will be found collected in 2 Thompson on Negligence, sec. 92, pp. 1294-1309.

⁵ *Lamphear v. Buckingham*, 33 Conn. 237; *Beach v. Bay State etc. Co.*, 10 Abb. Pr. 71; *Whitford v. R. R. Co.*, 23 N. Y. 465; *Haggerty v. R. R. Co.*, 31 N. J. L. 349. *Contra*, holding that

they are penal, and should be construed strictly: *Lexington v. Lewis*, 10 Bush, 677; *Board v. Searce*, 2 Duval, 576.

⁶ *Chicago v. Mayor*, 18 Ill. 349; *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356; *Louisville etc. R. R. Co. v. Burke*, 6 Cold. 45; *Baker v. Bailey*, 16 Barb. 54; *Donaldson v. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 391; *Pennsylvania etc. R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520; *Chicago v. Starr*, 42 Ill. 174; 89 Am. Dec. 422.

vessels for the death of a person caused by the negligence of the officers.¹ Under a statute of New York giving a right of action for wrongfully or negligently causing the death of any person, an action may be maintained for negligently causing the death of a citizen of New York on the high seas, on a vessel hailing from and registered in a New York port, and employed by the owners at the time in their own business.² In Massachusetts it has been held that the action would not lie where the death was instantaneous;³ but this is contrary to the weight of authority.⁴ Where the death is not instantaneous, there are two causes of action,—one for mental and bodily suffering before death, and the other for the loss of life. Both may be prosecuted by the personal representative, and one is not a bar to the other.⁵

§ 1018. Who may Sue—And for Whose Benefit.—Lord Campbell's act gives the action to the executor or administrator of the person killed, and so do the statutes of many of the states.⁶ Where the action is given to the "personal representatives," this means the executor or administrator, and not the next of kin.⁷ When the statute

¹ *Steamboat Co. v. Chase*, 16 Wall. 522; *The City of Brussels*, 6 Ben. 370.

² *McDonald v. Mallory*, 77 N. Y. 546; 33 Am. Rep. 664. *Contra*, *Armstrong v. Beadle*, 5 Saw. 484.

³ *Mann v. R. R. Co.*, 9 Cush. 108; *Hollenbeck v. R. R. Co.*, 9 Cush. 478; *Bancroft v. R. R. Co.*, 11 Allen, 34; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90; 28 Am. Rep. 214; *Moran v. Hollings*, 125 Mass. 93. And see *Hansford v. Payne*, 11 Bush, 380.

⁴ *Murphy v. R. R. Co.*, 30 Conn. 184; 29 Conn. 496; *Nashville etc. R. R. Co. v. Prince*, 2 Heisk. 580; *Brown v. R. R. Co.*, 22 N. Y. 191; *Whitford v. R. R. Co.*, 23 N. Y. 465; *Connors v. R. R. Co.*, 71 Iowa, 490; 60 Am. Rep. 814.

⁵ *Needham v. R. R. Co.*, 38 Vt. 294. *Contra*, *Hansford v. Payne*, 11 Bush, 380; *Connor v. Paul*, 12 Bush, 144.

⁶ And an administrator may be appointed to bring it even where there

is no other estate: *Hartford R. R. Co. v. Andrews*, 36 Conn. 213. *Contra*, *Perry v. R. R. Co.*, 29 Kan. 420, holding that the statutory right of action for death by wrongful act is not an "asset" of the estate of the deceased. Therefore if it is essential to the grant of letters testamentary that the deceased should either have been a resident of the county, or should have had assets therein, the grant of letters upon the estate of a non-resident who had no other assets in the county is void.

⁷ *Hagan v. Kean*, 3 Dill. 124; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Drew v. R. R. Co.*, 5 Chic. L. N. 314; *Kramer v. R. R. Co.*, 25 Cal. 434; *Whiton v. R. R. Co.*, 21 Wis. 305; *Boutiller v. Milwaukee*, 8 Minn. 97; *Needham v. R. R. Co.*, 38 Vt. 294; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Woodward v. R. R. Co.*, 28 Wis. 400.

makes the widow *and* next of kin beneficiaries, the action may be maintained where there is a widow and no kindred, or where there is next of kin and no widow.¹ It has been held that it is not material how remote the relationship may be, if the person claiming is dependent upon the deceased for support.² Where the statute provides that the recovery shall be for the exclusive benefit of the "next of kin," it is sufficient to maintain the action if there be either a widow or next of kin surviving, but there must be at least one surviving relative of the class named in the statute.³ An illegitimate child is not a "child,"⁴ but it is next of kin to its mother.⁵ A statute limiting the right of action to the widow, and if no widow then to the child or children, for the homicide of the husband or parent, gives no right of action to a husband for the death of his wife.⁶ A child *en ventre sa mere* is entitled to damages for the death of its father.⁷

Where it is provided that "a widow, and if no widow a child or children, may recover for the homicide of the husband or parent," if the widow sues and marries pending the suit, she may proceed to judgment notwithstanding the marriage.⁸ If she dies pending the suit, the action and the right of action survive to the children, whose damages will be measured by the injury to themselves.⁹ Where the widow brings suit and carries it to

¹ *Oldfield v. R. R. Co.*, 14 N. Y. 310; *Haggerty v. R. R. Co.*, 31 N. J. L. 349; *Johnston v. R. R. Co.*, 7 Ohio St. 336; 70 Am. Dec. 75; *Kansas etc. R. R. Co. v. Miller*, 2 Col. 442.

² *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Kemper v. Harris*, 25 Ohio St. 510.

³ *Safford v. Drew*, 3 Duer, 627; *Lucas v. R. R. Co.*, 21 Barb. 245; *Green v. R. R. Co.*, 16 How. Pr. 263; 31 Barb. 260; *Baltimore etc. R. R. Co. v. Gettle*, 3 W. Va. 376; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *McMahon v. New York*, 33 N. Y. 642; *Haggerty v. R. R. Co.*, 31 N. J. L.

349; *Oldfield v. R. R. Co.*, 14 N. Y. 310.

⁴ *Dickinson v. R. R. Co.*, 2 Hurl. & C. 735; *Blake v. R. R. Co.*, 10 Eng. L. & Eq. 443; *Harkins v. R. R. Co.*, 15 Phila. 286.

⁵ *Muhl's Adm'r v. R. R. Co.*, 10 Ohio St. 272.

⁶ *Georgia R. R. Co. v. Wynn*, 42 Ga. 331.

⁷ *The George and Richard*, L. R. 3 Am. & Eccl. 466.

⁸ *Ga. etc. R. R. C. v. Garr*, 57 Ga. 277; 24 Am. Rep. 492.

⁹ *David v. R. R. Co.*, 41 Ga. 223; *Macon R. R. Co. v. Johnson*, 38 Ga. 409; *Taylor v. R. R. Co.*, 45 Cal. 323.

judgment in her own name, the damages which can be considered are only her own damages, and not those suffered by the children also.¹ A wife is not prevented from maintaining an action for the negligent killing of her husband by the fact that she had been living in separation from him.² In some states, the father, or if he is dead the mother, may bring suit, if the person killed was a minor child.³ Husband and wife are not next of kin to each other.⁴ In Pennsylvania, the action does not lie in favor of the parents where a son leaves a widow.⁵ In Texas, the action lies though the plaintiff's son was of age.⁶ A statute giving a right of action to children will not extend to grandchildren.⁷ Where a widow or child "may recover for the homicide of the husband or parent," minor children may recover for the homicide of the mother.⁸ Where "a widow, or if no widow a child or children, may recover for the homicide of the husband or parent," the adult child of one who left no widow cannot recover.⁹ Where a woman four or five months pregnant fell on a defective highway, and was delivered of the child, which survived but a few minutes, the child was not a "person" within the statute giving a cause of ac-

¹ *Macon R. R. Co. v. Johnson*, 38 Ga. 409.

² *Dallas etc. R. R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297.

³ See Ala. Code, sec. 2899 (1876); *Frank v. R. R. Co.*, 20 La. Ann. 25; *Walters v. R. R. Co.*, 36 Iowa, 458; *Muldowney v. R. R. Co.*, 36 Iowa, 462; *Oldfield v. R. R. Co.*, 3 E. D. Smith, 103; 14 N. Y. 310; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Quin v. Moore*, 15 N. Y. 432; *McMahon v. New York*, 33 N. Y. 642; *Ihl v. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Louisville etc. R. R. Co. v. Connor*, 9 Heisk. 19.

⁴ *Townsend v. Radcliffe*, 44 Ill. 446; *Administratrix of Dunhene v. Ohio Life Ins. Co.*, 1 Disn. 257; *Lucas v. R. R. Co.*, 21 Barb. 245; *Green v. R. R. Co.*, 32 Barb. 25; *Dickens v. R. R. Co.*, 23 N. Y. 158; *Worley v. R. R.*

Co., 1 Handy, 481; *Drake v. Gilmore*, 52 N. Y. 389. See *Steele v. Kurtz*, 23 Ohio St. 191. Where the action is given for the benefit of the widow and next of kin, if the action is brought for the killing of the wife, the husband is entitled as next kin to such share as he would take in her estate under the statute of distributions; the words "next of kin" being used in the statute in this peculiar sense.

⁵ *Lehigh Iron Co. v. Ruff*, 100 Pa. St. 95.

⁶ *Houston etc. R. R. Co. v. Cowser*, 57 Tex. 293.

⁷ *McCutcheon v. Receivers*, 3 Cent. L. J. 635.

⁸ *Atlanta etc. R. R. Co. v. Venable*, 65 Ga. 55.

⁹ *Mott v. R. R. Co.*, 70 Ga. 680; 48 Am. Rep. 595.

tion for negligent death to the administrator.¹ Where the husband and wife and children all perished in the same disaster, no right of action survived, though the wife might slightly have outlived her husband.² The money recovered by the personal representative in such actions is not for the benefit of the estate, and the creditors, therefore, have no claim on it. The recovery constitutes a special fund for the beneficiaries under the statute.³

§ 1019. **Wrongful Act, Neglect, or Default.** — These words in the statutes cover negligence, and hence it is no defense that the death was unintentionally caused.⁴ A gas company which orders its servant into a room from which the gas cannot escape, so that he suffocates, is liable to his personal representatives;⁵ but under a statute giving a right of action where death ensues from an "injury inflicted by the wrongful act of another," such action cannot be maintained against one charged only with passive neglect or a mere omission of duty.⁶ The Kentucky statute allows in the case of a killing by "willful neglect" the giving of punitive damages.⁷ "Willful neglect" in this statute means "such conduct as evidences reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty in the performance of which the public has an interest."⁸ It is said that "willful neglect and wanton neglect are nearly synonymous, each implying either actual malice or anti-social recklessness";⁹ but "gross negligence" is

¹ Dietrich v. Northampton, 138 Mass. 14; 52 Am. Rep. 242.

² Gibbs v. Hannibal, 82 Mo. 143.

³ Whitford v. R. R. Co., 23 N. Y. 465; Haggerty v. R. R. Co., 31 N. J. L. 349; Chicago v. Major, 18 Ill. 349; 68 Am. Dec. 553; Waldo v. Goodsell, 33 Conn. 432; Lyon v. R. R. Co., 7 Ohio St. 336; Andrews v. R. R. Co., 34 Conn. 57; South etc. R. R. Co. v. Sullivan, 59 Ala. 272.

⁴ Baker v. Bailey, 16 Barb. 54; Ginn v. R. R. Co., 8 Hun, 494.

⁵ Citizens' Gas Light etc. Co. v. O'Brien, 118 Ill. 174.

⁶ Bradbury v. Furlong, 13 R. I. 15; 43 Am. Rep. 1.

⁷ 2 Ky. Rev. Stats., 510, sec. 3.

⁸ Jacob's Adm'r v. R. R. Co., 10 Bush, 263; Lexington v. Lewis's Adm'x, 10 Bush, 677.

⁹ Board of Internal Improvements v. Searce, 2 Duvall, 576; Lexington v. Lewis's Adm'x, 10 Bush, 677. Mere negligence of a railroad employee causing a death is not a "will-

not synonymous with "willful neglect."¹ An intentional killing is not within the statute.² "Wrongful act or omission" in a statute is synonymous with negligent act or omission;³ but these words do not cover the death of one who died immediately after drinking liquor sold him by one knowing his intemperate habits.⁴ Where the killing was intentional, there can be no recovery if it was justifiable.⁵ But no presumption of wrong or malice arises from the mere act of killing, as in criminal prosecutions.⁶ In Georgia it is held that if, in resisting a battery, the assailant be willfully slain, his widow may recover damages, unless the homicide be justifiable. If it amounts either to murder or voluntary manslaughter, it is a cause of action. The aggressive conduct of the deceased, and his unlawful violence, will go in mitigation of damages.⁷

§ 1020. Right not Enlarged by Statute — No Action if Deceased could not have Sued. — The statutes give an action only when the deceased himself, if the injury had not resulted in his death, might have maintained one. In other words, it continues, for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and only enlarges its scope to embrace the injury resulting from the death.⁸

ful act or omission": *Houston etc. v. R. Co. v. Baker*, 57 Tex. 419.

¹ *Hansford v. Payne*, 11 Bush, 330.

² *Spring v. Glenn*, 12 Bush, 172.

³ *Jefferson etc. R. R. Co. v. Riley*, 39 Ind. 568.

⁴ *King v. Henkie*, 80 Ala. 505; 60 Am. Rep. 119; but see, *contra*, *McCue v. Klein*, 60 Tex. 168; 48 Am. Rep. 260.

⁵ As to what is justification, see Chapter LI., Assault.

⁶ *Evans v. Newland*, 34 Ind. 112.

⁷ *Weekes v. Cottingham*, 58 Ga. 559.

⁸ *Read v. R. R. Co. L. R. 3 Q. B. 555*; *Senior v. Ward*, 1 El. & E. 385; *Connor v. Paul*, 12 Bush, 144; *McCubbin v. Hastings*, 27 La. Ann. 713; *Spiva v. Coal Co.*, 88 Mo. 68; *Holton*

v. Daly, 106 Ill. 131. But the administrator of a deceased wife may sue, though if she had lived she could not have sued without joining her husband: *Green v. R. R. Co.*, 31 Barb. 260. The administrator can bring an action for the injury under the same restrictions and on the same grounds that the party injured, if death had not ensued, might have done: *Meara's Adm'r v. Holbrook*, 20 Ohio St. 137; 5 Am. Rep. 633. But if the party injured, having a right of action, brings suit upon it, and dies pending the suit, as the suit thereby abates, it is no impediment to a suit by the administrator: *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143.

Therefore, though a right to recover be given to a widow or children for the homicide of the husband or parent, in broad terms and without qualification, yet this does not cover every case of homicide. Cases of self-defense, of inevitable accident, of execution by command of the law, etc., must, from the nature of things, be excepted.¹ So damages cannot be recovered where the deceased was guilty of contributory negligence;² or where the death was caused by the neglect of a fellow-servant in the common employment of the defendant;³ or where the death was

¹ *Western etc. R. R. Co. v. Strong*, 52 Ga. 461. But the doctrine that he who seeks and originates an affray resulting in homicide cannot avail himself of the plea of self-defense is not applicable to a civil suit for damages brought by a representative of the deceased: *Besenecker v. Sale*, 8 Mo. App. 211.

² *Hill v. R. R. Co.*, 9 Heisk. 823; *Thorogood v. Bryan*, 8 Com.B. 115; *Sims v. R. R. Co.*, 28 Ga. 93; *Sears v. R. R. Co.*, 53 Ga. 630; *Oldfield v. R. R. Co.*, 3 E. D. Smith, 103; *Sheridan v. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490; *Springett v. Ball*, 4 Fost. & F. 472; *Bancroft v. R. R. Co.*, 97 Mass. 275; *State v. R. R. Co.*, 24 Md. 84, 108; 87 Am. Dec. 600; *Baltimore etc. R. R. Co. v. Miller*, 29 Md. 252; *Baltimore etc. R. R. Co. v. Smith*, 29 Md. 460; *Baltimore etc. R. R. Co. v. Fryer*, 30 Md. 47; *Northern etc. R. R. Co. v. Geis*, 31 Md. 357; *Baltimore etc. R. R. Co. v. Trainor*, 33 Md. 542; *Cumberland etc. R. R. Co. v. Fazenbaker*, 37 Md. 156; *Lehman v. Brooklyn*, 29 Barb. 234; *Mitchell v. R. R. Co.*, 2 Hun, 535; *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; *Lofton v. Vogles*, 17 Ind. 105; *Evansville etc. R. R. Co. v. Lowdermilk*, 15 Ind. 120; *Bronk v. R. R. Co.*, 5 Daly, 454; *Massoth v. Delaware etc. Canal Co.*, 6 Hun, 314; *Willets v. R. R. Co.*, 14 Barb. 585; *Button v. R. R. Co.*, 18 N. Y. 248; *Knight v. R. R. Co.*, 23 La. Ann. 462; *Maher v. R. R. Co.*, 64 Mo. 267; *Karle v. R. R. Co.*, 55 Mo. 476; *Tucker v. Chaplin*, 2 Car. & K. 730; *Louisville etc. R. R. Co. v. Burke*, 6 Cold. 45; *Higgins v. R. R. Co.*, 36 Mo.

418; *Hæran v. R. R. Co.*, 64 Mo. 480; 65 Mo. 22; *Curran v. Warren Chemical etc. Co.*, 36 N. Y. 153; *Wilds v. R. R. Co.*, 24 N. Y. 430; *Witherley v. Regent's Canal Co.*, 12 Com. B., N. S., 2; *Gay v. Winter*, 34 Cal. 153; *Rowland v. Cannon*, 35 Ga. 105; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Telfer v. R. R. Co.*, 30 N. J. L. 188; *Paulmier v. R. R. Co.*, 34 N. J. L. 151; *Beaucoup Coal Co. v. Cooper*, 12 Ill. App. 373; *Moody v. Peleterson*, 11 Ill. App. 180; *Berry v. R. R. Co.*, 72 Ga. 137. But the action is not barred because the injured person did not adopt the best remedies or follow implicitly the directions of his physician: *Texas etc. R. R. Co. v. Orr*, 46 Ark. 182.

³ *Senior v. Ward*, 28 L. J. Q. B. 139; 7 Week. Rep. 261; 5 Jur., N. S., 172; 1 El. & E. 385; *Wigmore v. Jay*, 19 L. J. Ex. 300; 5 Ex. 354; *Toledo etc. R. R. Co. v. Conroy*, 68 Ill. 560; *McMillan v. R. R. Co.*, 20 Barb. 449; *Slattery's Adm'r v. R. R. Co.*, 23 Ind. 81; *Hubgh v. R. R. Co.*, 6 La. Ann. 495; 54 Am. Dec. 565; *Madison etc. R. R. Co. v. Bacon*, 66 Ind. 205; *Dynen v. Leach*, 26 L. J. Ex. 221; *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114; *Jeffersonville etc. R. R. Co. v. Hendricks*, 26 Ind. 228; 41 Ind. 48; *Higgins v. R. R. Co.*, 36 Mo. 418; *Packet Co. v. McCue*, 17 Wall. 508; *Kansas etc. R. R. Co. v. Salmon*, 11 Kan. 83; *Hutchinson v. R. R. Co.*, 6 Eng. Rail. Cas. 580; *Elliott v. R. R. Co.*, 67 Mo. 272; *Smith v. Steele*, 44 L. J. Q. B. 60; L. R. 10 Q. B. 125; *Swainson v. R. R. Co.*, 26 Week. Rep. 413; *Cannon v. Rowland*, 34 Ga.

not the natural and proximate result of the injury;¹ or where the deceased was engaged in an illegal service;² or where the party injured had compromised for the injury and accepted satisfaction previous to the death.³

§ 1021. **Damages — Measure of.** — The ground of recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard. "These damages," as said by Pollock, C. B., "are not to be given as a *solatium*."⁴ For

422; Chicago etc. R. R. Co. v. Swett, 45 Ill. 197; 92 Am. Dec. 206; Toledo etc. R. R. Co. v. Moore, 77 Ill. 217; Ohio etc. R. R. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259; McDonald v. Mfg. Co., 68 Ga. 839; 67 Ga. 761. In Missouri, it was held that a statute providing that "whenever any person shall die, . . . the action shall lie by his surviving relatives," does not alter the rule that a servant cannot recover for the negligence of a fellow-servant: Proctor v. R. R. Co., 64 Mo. 112; overruling Schultz v. R. R. Co., 36 Mo. 13; Connor v. R. R. Co., 59 Mo. 285; but see Philo v. R. R. Co., 33 Iowa, 47.

¹ Wagner v. Woolsey, 1 Heisk. 235; Sherman v. West. Stage Co., 24 Iowa, 515; Ginna v. R. R. Co., 8 Hun, 494; 67 N. Y. 596; Nickerson v. Harriman, 38 Me. 277; McLean v. Burbank, 11 Minn. 277; Baltimore etc. R. R. v. Trainor 33 Md. 542. A and B fought, and B's son came to his father's rescue and killed A. A's wife sued B. Held, that she could not recover, the homicide not being the natural and proximate result of B's wrong: White v. Conly, 14 Lea, 51; 52 Am. Rep. 154.

² Martin v. Wallace, 40 Ga. 52.

³ Read v. R. R. Co., L. R. 3 Q. B. 555.

⁴ Franklin v. R. R. Co., 3 Hurl. & N. 211; Blake v. R. R. Co., 18 Q. B. 93; Pennsylvania R. R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526; Pennsylvania R. R. Co. v. Ogier, 35 Pa. St. 60; 78 Am. Dec. 322; Pennsylvania R. R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. R. Co. v. Vandever, 36 Pa. St. 298; North Pennsylvania R. R. Co. v.

Robinson, 44 Pa. St. 175; Catawissa R. R. Co. v. Armstrong, 52 Pa. St. 282; Pennsylvania R. R. Co. v. Butler, 57 Pa. St. 335; Pennsylvania R. R. Co. v. Goodman, 62 Pa. St. 329; Huntingdon etc. R. R. Co. v. Decker, 84 Pa. St. 419; Southwestern R. R. Co. v. Paulk, 24 Ga. 356; Kansas etc. R. R. Co. v. Miller, 2 Col. 442; Brady v. Chicago, 4 Biss. 448; Barley v. R. R. Co. 4 Biss. 430; Lehman v. Brooklyn, 29 Barb. 234; Green v. R. R. Co., 32 Barb. 25; Kesler v. Smith, 66 N. C. 154; Collier v. Arrington, Phill. (N. C.) 356; Telfer v. R. R. Co., 30 N. J. L. 188; Foppaur v. Baker, 3 Mo. App. 559; Chicago v. Major, 18 Ill. 349; 68 Am. Dec. 553; Chicago etc. R. R. Co. v. Morris, 26 Ill. 400; Chicago etc. R. R. Co. v. Shannon, 43 Ill. 338; Chicago etc. R. R. Co. v. Swett, 45 Ill. 197; 92 Am. Dec. 206; Conant v. Griffin, 48 Ill. 410; Illinois etc. R. R. Co. v. Weldon, 52 Ill. 290; Illinois etc. R. R. Co. v. Baches, 55 Ill. 379; Chicago v. Scholten, 75 Ill. 468; Chicago v. Harwood, 80 Ill. 88; Paulmier v. R. R. Co., 34 N. J. L. 151; Donaldson v. R. R. Co., 18 Iowa, 250; 87 Am. Dec. 391; Nashville etc. R. R. Co. v. Stevens, 9 Heisk. 12; Covington Street R. R. Co. v. Packer, 9 Bush, 455; 15 Am. Rep. 725; Ohio etc. R. R. Co. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259; Long v. Morrison, 14 Ind. 595; 77 Am. Dec. 72; March v. Walker, 48 Texas, 372; Kansas etc. R. R. Co. v. Cutter, 19 Kan. 83; Holmes v. R. R. Co., 6 Saw. 262; Lawson v. R. R. Co., 64 Wis. 447; 54 Am. Rep. 634; Aur v. R. R. Co., 29 Fed. Rep. 72.

distress of mind damage cannot be recovered, nor are the "opportunities of acquiring wealth or fortune by change of circumstances in life" to be considered.¹ In the case of a fireman killed by the explosion of a boiler, an instruction that the jury might "consider the shock to the feelings of the wife" is erroneous.² An injury received by a next of kin by the dissolution of a partnership relation between himself and the deceased cannot be recovered for.³ The pain and suffering by the deceased are not elements of damage to be recovered by survivors.⁴ Generally, there must be some evidence of pecuniary loss on the part of the beneficiary.⁵ In some relations it is presumed. Thus pecuniary damage will be presumed in the case of an action for the benefit of a widow and children.⁶ Also in the case of a suit for the death of a child, for the benefit of parents.⁷ The facts that the children of one killed by negligence are of full age and not living with their parent, and are supporting themselves, do not alone show that they have sustained no pecuniary damage from the parent's death.⁸ The damages recoverable by the administrator are not necessarily nominal.⁹ In an action by a widow and children, the plaintiffs have an interest in the deceased's life to the extent of their support, at least, although he was largely indebted at the time of his death.¹⁰

It is not necessary that the beneficiary should have a legal claim on the deceased.¹¹ So the jury may consider

¹ *Mansfield Coal and Coke Co. v. McNery*, 91 Pa. St. 185; 36 Am. Rep. 662.

² *Nashville etc. R. R. Co. v. Stevens*, 9 Heisk. 12.

³ *Demarest v. Little*, 42 N. J. L. 28.

⁴ *Barron v. R. R. Co.*, 1 Biss. 412; *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; *Holton v. Daly*, 106 Ill. 131.

⁵ *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400; Ill. etc. R. R. Co. *v. Weldon*, 52 Ill. 290.

⁶ *Adm'x of Dunhene v. Ohio Life etc. Co.*, 1 Disn. 257; *Stoher v. R. R. Co.*, 91 Mo. 509; *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543.

⁷ *Chicago v. Scholten*, 75 Ill. 468; *Condon v. R. R. Co.*, 16 I. C. L. R. 415; *Robel v. R. R. Co.*, 35 Minn. 84.

⁸ *Lockwood v. R. R. Co.*, 98 N. Y. 523.

⁹ *Corliss v. R. R. Co.*, 63 N. H. 404.

¹⁰ *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315.

¹¹ *Keller v. R. R. Co.*, 17 How. Pr. 102; *Paulmier v. R. R. Co.*, 34 N. J. L. 151; *Pennsylvania R. R. Co. v. Keller*, 67 Pa. St. 300; *Oldfield v. R. R. Co.*, 14 N. Y. 310; *McIntyre v. R. R. Co.*, 37 N. Y. 287; *Grotenkemper v. Harris*, 25 Ohio St. 510; *R. R. Co. v. Barron*, 5 Wall. 90.

the loss sustained by deprivation "of his wife's society."¹ The damages are not confined to an immediate loss of money to those for whose benefit the action is brought. Thus the loss of the benefit of an education, and the comforts and conveniences of life, depending upon the possession of pecuniary means to obtain them, through the death of a relative whose duty or habit it was to supply them, is an injury in respect to which an action may be maintained.² So the injury to a widow in the loss of her husband's care, protection, support, and assistance may be considered in estimating damages.³ So the jury may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gives to the children.⁴ In Georgia, when the action is brought in the interest of children for the loss of their father, the damages should be the present worth of a reasonable support for them during minority, according to the expectations of the father's life, and in view of his condition in life, prospects, habits, etc.⁵ In Pennsylvania the rule is thus stated: "The loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration ability and disposition to labor, and his habits of living and expenditure."⁶ In some other states, the probable value of the nurture, instruction, and physical, moral, and intellectual training which the parent for whose loss the suit is brought might have given to the children, are considered proper elements

¹ *Cregin v. R. R. Co.*, 19 Hun, 341.

² *Pym v. R. R. Co.*, 2 Best & S. 759; 4 Best & S. 396; *Collins v. Davidson*, 19 Fed. Rep. 83; *Howard Co. Comm'r's v. Legg*, 93 Ind. 523; 47 Am. Rep. 390.

³ *Atchison v. Irvine*, 9 Kan. 350; *Beeson v. Mining Co.*, 57 Cal. 20; *Ohio etc. R. R. Co. Tindall*, 13 Ind. 366; 74 Am. Dec. 259. *Contra*, *Howard Co.*

Comm'r's v. Legg, 93 Ind. 523; 47 Am. Rep. 390.

⁴ *Tilley v. R. R. Co.*, 29 N. Y. 252; 86 Am. Dec. 297.

⁵ *David v. R. R. Co.*, 41 Ga. 223; 7 *Catawissa v. R. R. Co. v. Armstrong*, 52 Pa. St. 282.

⁶ *Penn. R. R. Co. v. Butler*, 57 Pa. St. 335; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185; 36 Am. Rep. 662.

of damages.¹ Nursing, medical attendance, and funeral expenses are also recoverable.²

In England, under the statute, no action will lie for the recovery of merely nominal damages.³ But in the United States, where actual damages are not proved, nominal damages are recoverable.⁴ But exemplary damages are not recoverable, unless the statute expressly or impliedly authorizes them.⁵ In Missouri they are by implication,⁶ and in some other states they are expressly allowed.⁷ The statutes of some of the states assess the damages in such actions at a fixed sum, or fix a maximum or minimum of recovery. The court has power to set aside as excessive a verdict rendered under the statute allowing a right of action and the recovery of damages to the amount of five thousand dollars, where death is caused by negligence. In this class of cases, as in others, damage must be proved.⁸ In the absence of a statute, the amount of the verdict rests largely in the discretion of the jury, whose conclusion will not be reversed unless manifestly

¹ Cooley on Torts, 274; *Tilley v. R. R. Co.*, 29 N. Y. 252; 83 Am. Dec. 297; *Ill. etc. R. R. Co. v. Weldon*, 52 Ill. 290; *Castello v. Landwehr*, 28 Wis. 532; *McIntyre v. R. R. Co.*, 37 N. Y. 287.

² *Penn. R. R. Co. v. Bantom*, 54 Pa. St. 495; *Cleveland etc. R. R. Co. v. Rowan*, 66 Pa. St. 393; *Owen v. Brockschmidt*, 54 Mo. 285; *Roeder v. Ormsby*, 22 How. Pr. 270; *Rains v. R. R. Co.*, 71 Mo. 164; 36 Am. Rep. 459; *Murphy v. R. R. Co.*, 88 N. Y. 445. *Contra*, in England, *Boulter v. R. R. Co.*, 13 Week. Rep. 289; *Dalton v. R. R. Co.*, 4 C. B., N. S., 296.

³ *Duckworth v. Johnson*, 4 Hurl. & N. 633; *Boulter v. Webster*, 13 Week. Rep. 289.

⁴ *Quin v. Moore*, 15 N. Y. 432; *Ihl v. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Lehman v. Brooklyn*, 29 Barb. 234; *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *Chicago etc. R. R. Co. v. Smith*, 45 Ill. 197; 92 Am. Dec. 206; *Chicago*

etc. R. R. Co. v. Scholten, 75 Ill. 468.

⁵ *Conant v. Griffin*, 48 Ill. 410; *Western R. R. Co. v. Paulk*, 24 Ga. 356; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland etc. R. R. Co. v. Rowan*, 66 Pa. St. 393; *Baltimore etc. R. R. Co. v. Kelly*, 24 Md. 271.

⁶ *Owen v. Brockschmidt*, 54 Mo. 285; *Foppiano v. Baker*, 3 Mo. App. 559.

⁷ *Bowler v. Lane*, 3 Met. (Ky.) 311; *Covington Street R. R. Co. v. Packer*, 9 Bush, 455; 15 Am. Rep. 725; *Louisville etc. R. R. Co. v. Case's Adm'r*, 9 Bush, 728; *Jacobs's Adm'r v. Louisville etc. R. R. Co.*, 10 Bush, 263; *Myers v. San Francisco*, 42 Cal. 215; *Matthews v. Warner*, 29 Gratt. 570; 26 Am. Rep. 396.

⁸ *Houghkirk v. Delaware etc. Canal Co.*, 92 N. Y. 219; 44 Am. Rep. 370.

wrong.¹ The question, What did the deceased usually earn? is a material and important inquiry in forming an estimate of the pecuniary loss sustained by the next of kin by reason of negligence.²

§ 1022. **Where Deceased a Minor.**—In the case of the death of a minor child, the measure of damages is the value of his services from the time of the injury until the child arrives of age, less the expense of maintenance, etc., estimated in connection with the expectation of life,³ and less the expense of its support.⁴ In some cases the parents may recover damages for services he would have rendered after that time.⁵ There can be no recovery for loss of companionship or association, or injury to the parents' feelings.⁶ In an action for the death of a boy seven or eight years of age, if the family was poor, the fact that the boy would probably early have commenced to assist in supporting the family may be taken into consideration.⁷ The loss of service of a child, who was killed by

¹ *Staal v. R. R. Co.*, 57 Mich. 239. The court on appeal has refused to disturb verdicts as follows: Four thousand five hundred dollars for the negligent killing of a laborer sixty years old, of good health and industrious habits: *Walter v. R. R. Co.*, 39 Iowa, 33. Three thousand dollars for the death of a husband, leaving an infant child: *Ill. etc. R. R. Co. v. Hoffman*, 67 Ill. 287. Two thousand five hundred dollars for the death of a workman, in fair health, who could earn \$2.25 per day, and whose family was largely dependent on him for support: *Annas v. Milwaukee and Northern R. R. Co.*, 67 Wis. 46. Eight thousand dollars, where plaintiff's husband was killed, she being an invalid with a daughter: *Cook v. R. R. Co.*, 60 Cal. 604. Fifteen thousand dollars for the death of a young and robust skilled workman: *East Line etc. R. R. Co. v. Smith*, 65 Tex. 167. Two thousand dollars for the death of a married unskilled laborer, fifty-five years old, leaving a widow and seven children: *Mulcairns v. Janesville*, 67 Wis. 24.

² *McIntyre v. R. R. Co.*, 37 N. Y. 287.

³ *Birmingham v. Dover*, 2 Brewst. 69; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; *Penn. etc. R. R. Co. v. Bantom*, 54 Pa. St. 495; *Caldwell v. Brown*, 53 Pa. St. 453; *Quin v. Moore*, 15 N. Y. 432; *Chicago v. Hesing*, 83 Ill. 205; 25 Am. Rep. 378; *Chicago v. Scholten*, 75 Ill. 469; *Lehman v. Brooklyn*, 29 Barb. 234; *Barley v. R. R. Co.*, 4 Biss. 430; *Ford v. Monroe*, 20 Wend. 210; *Durkee v. R. R. Co.*, 56 Cal. 388; 38 Am. Rep. 59.

⁴ *St. Louis etc. R. R. Co. v. Freeman*, 36 Ark. 41; *Benton v. R. R. Co.*, 55 Iowa, 496.

⁵ *Potter v. R. R. Co.*, 21 Wis. 372; 94 Am. Dec. 548; 22 Wis. 615; *Durkee v. R. R. Co.*, 56 Cal. 388; 38 Am. Rep. 59.

⁶ *Little Rock etc. R. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; *Galveston v. Barbour*, 62 Tex. 172; 50 Am. Rep. 519.

⁷ *Barley v. R. R. Co.*, 4 Biss. 430.

negligence, and the expense of the sickness of the mother, caused by her grief, are proper items of damage.¹ Although the parents had given his time to the boy killed, they may recover damages for loss of support, etc.² It cannot be ruled as matter of law that the brothers and sisters of the person killed (a minor) sustained no loss.³ The following verdicts have been sustained on appeal: Eight hundred dollars for the death of a child of four years;⁴ two thousand dollars for the death of a child between six and seven years;⁵ three thousand dollars for the death of a child eighteen months old;⁶ five thousand dollars for the killing of a child seven years old;⁷ two thousand dollars for killing a boy eighteen months old.⁸ But a verdict of eighteen hundred dollars, where the child was five years of age, was held excessive.⁹ Where a father claims damages for the negligent killing of his son, a verdict of four thousand dollars cannot be sustained on evidence merely of the fact of relationship, there being no evidence of the condition, pecuniary or physical, of the father, or of his age.¹⁰ A verdict for ten thousand dollars was set aside, it appearing that the next of kin entitled to the benefit of the verdict was a mother in comfortable pecuniary circumstances, who had derived no profit from the earnings of her son, nor was likely to profit by his earnings had he lived.¹¹ Four thousand five hundred dollars for loss of services caused by the death of a child five years old was held excessive.¹²

¹ Ford v. Munroe, 20 Wend. 210.

⁷ Myers v. San Francisco, 42 Cal.

² St. Joseph etc. R. R. Co. v. Wheeler, 35 Kan. 185.

215.

⁸ Schrier v. R. R. Co., 65 Wis.

³ Chicago v. Keefe, 114 Ill. 222; 55 Am. Rep. 860.

457.

⁹ Penn. Co. v. Lilly, 73 Ind. 252.

⁴ Chicago v. Major, 18 Ill. 349; 68 Am. Dec. 593; Chicago v. Hesing, 83 Ill. 207; 25 Am. Rep. 378.

¹⁰ Carpenter v. R. R. Co., 38 Hun,

116.

⁵ Chicago etc. R. R. Co. v. Becker, 84 Ill. 483.

¹¹ Atchison etc. R. R. Co. v. Brown, 26 Kan. 443.

⁶ Louisville etc. R. R. Co. v. Connor, 9 Heisk. 20;

¹² Little Rock etc. Co. v. Barker, 33 Ark. 350; 34 Am. Rep. 44.

ILLUSTRATIONS.—A father claimed damages for the death of his son twelve years of age. The boy had been living at home, earning nothing, and being pecuniarily a burden to his parents; but it was said that in a year or so he might have gone to work in a neighboring factory, and have taken back money to his parents. *Held*, that the father was entitled to damages: *Bramwell v. Lees*, 29 L. T. 82, 266. The action was brought by a widow for the death of her son, aged fourteen. Her husband, a herd, had been killed by the same accident, for which she had recovered four hundred pounds in another action. The boy was being sent to school, but when at home used to work on the farm in his father's absence. He never earned any wages, but his capabilities were valued at sixpence a day. *Held*, that the probability (increased by the past filial conduct of the deceased, and enhanced by reason of the father's death) that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, was evidence to go to the jury upon the question of damages, and that a verdict could not have been directed for the defendants: *Condon v. R. R. Co.*, 1 I. R. 16 C. L. 415.

§ 1023. Evidence — In General.—The wealth of the defendant is irrelevant,¹ and so is, ordinarily, the poverty of the plaintiff.² But evidence as to the amount of property deceased has acquired, his habits of industry, his ability to make money, and his success in business, is admissible as a basis of damages;³ or that the plaintiff was in indigent circumstances and dependent upon her

¹ *Conant v. Griffin*, 48 Ill. 410.

² *Illinois etc. R. R. Co. v. Baches*, 55 Ill. 379; *Chicago etc. R. R. Co. v. Bayfield*, 37 Mich. 205; the court saying: "The damages recoverable in a case of this nature are by the statute to be assessed with reference 'to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person': Comp. Laws, sec. 2351. They have no regard to the needs of the persons designated, or to any moral obligation which may have rested upon the deceased to supply their wants. . . . What the family would lose by the death would be what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime: and to show that the family were poor has no tendency toward

showing whether this was or was likely to be large or small. . . . There are, it is true, some cases in which, perhaps, such evidence must be received, because it tends to establish a moral obligation to demand assistance in the future from one at the time incapable of giving it; as where the person killed was a very young child, and at present contributing nothing in aid of any one: *Ewen v. R. R. Co.*, 38 Wis. 613; *Barley v. R. R. Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169. But it is a sort of evidence that when necessarily received should be used with caution": *Chicago etc. R. R. Co. v. Henry*, 7 Ill. App. 322; *Chicago v. McCulloch*, 10 Ill. App. 459.

³ *Shaber v. R. R. Co.*, 28 Minn. 103.

son.¹ Evidence of the number in the deceased's family is inadmissible to show the value of his life to his estate.² A woman may show how many children are dependent on her;³ that she had no means of support except what her husband furnished her;⁴ that the deceased was a kind and good husband and father.⁵ It is not competent on the question of damages to show that deceased was in the line of promotion, and would have received greater wages.⁶ The negotiations of the plaintiff with the defendant, with reference to the settlement of the claim for damages, are not admissible for the purpose of showing harsh and oppressive conduct of the defendant in resisting the claim, his liability to pay some damages not having been denied.⁷

§ 1024. **In Mitigation.**—As evidence as to the business, education, and habits of sobriety and economy of the deceased is admissible,⁸ so also the character of the deceased as a drunken, worthless man, making no provision for his family, but being a burden to them for his support, is proper in mitigation of damages.⁹ In a suit by a widow for the homicide of her husband, the record of the acquittal of the defendant under an indictment for the murder of the husband is not evidence for the defendant in a civil suit.¹⁰ The receipt of money, by those for whose benefit the action was brought, on a policy of insurance on the life of the deceased, cannot be shown to reduce the amount of recovery;¹¹ or that the deceased was insured.¹² The probability of the widow's subsequent mar-

¹ *Int. etc. R. R. Co. v. Kindred*, 57 Tex. 491.

² *Beems v. R. R. Co.*, 58 Iowa, 150.

³ *Mulcairns v. Janesville*, 67 Wis. 25; *Beard v. Skeldon*, 13 Ill. App. 54.

⁴ *Annas v. R. R. Co.*, 67 Wis. 46; 58 Am. Rep. 848.

⁵ *Cook v. R. R. Co.*, 60 Cal. 604.

⁶ *Brown v. R. R. Co.*, 64 Iowa, 652.

⁷ *Green v. R. R. Co.*, 32 Barb. 24.

⁸ *Taylor v. R. R. Co.*, 45 Cal. 323;

Chicago etc. R. R. Co. v. Clark, 108 Ill. 113.

⁹ *Nashville etc. R. R. Co. v. Prince*, 2 Heisk. 580.

¹⁰ *Cottingham v. Weeks*, 54 Ga. 275.

¹¹ *Sherlock v. Alling*, 44 Ind. 184; *Althorf v. Wolfe*, 22 N. Y. 355; *Carroll v. R. R. Co.*, 88 Mo. 239; 57 Am. Rep. 382.

¹² *Kellogg v. R. R. Co.*, 79 N. Y. 72; *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15.

riage is irrelevant.¹ It is admissible for a defendant to show that a plaintiff was not entitled to the services of his minor child, whose death is in question.² A master cannot bring an action for the negligent killing of his own son, who was merely his servant, for the benefit lost must arise through relationship, and not through contract; and if no loss was due to the former as such, none due to the latter could be taken into account.³

§ 1025. **Pleading.**—Where the statute gives the remedy in favor of certain specified persons, the petition should name the person for whose benefit the suit is brought, and state the relationship.⁴ Where the recovery is to be distributed like personal estate, it will be presumed, without any allegation, that kindred exist.⁵ Where the statute gives a right of action to the parent of one who was a minor and unmarried, the petition is defective in not stating that he was unmarried.⁶ In an action by an administrator, the complaint need not allege that the intestate left next of kin.⁷ In stating the cause of action, the statute need not be referred to.⁸ The particular acts of negligence causing the death of the party injured need not be set out;⁹ and it is not necessary to allege that pecuniary damage has been sustained.¹⁰ But under a statute giving

¹ *Baltimore and Ohio R. R. Co. v. State*, 33 Md. 542; *Georgia etc. R. R. Co. v. Garr*, 57 Ga. 277; 24 Am. Rep. 492. And see *Seaman v. Farmers' Loan Co.*, 15 Wis. 578.

² *Quincy Coal Co. v. Hood*, 77 Ill. 68.

³ *Sykes v. Northeastern R. R. Co.*, 44 L. J. Com. P. 191.

⁴ *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Indiana etc. R. R. Co. v. Keeley*, 23 Ind. 133; *Safford v. Drew*, 3 Duer, 627. *Contra*, *Keller v. R. R. Co.*, 24 How. Pr. 172. In *Indiana* and other states an averment that there are persons entitled is sufficient without naming them: *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 49; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400;

Woodward v. R. R. Co., 23 Wis. 400; *Conant v. Griffin*, 43 Ill. 410.

⁵ *Alabama etc. R. R. Co. v. Waller*, 48 Ala. 459.

⁶ *Dulaney v. R. R. Co.*, 21 Mo. App. 597.

⁷ *Warner v. R. R. Co.*, 94 N. C. 250.

⁸ *White v. Maxey*, 64 Mo. 552.

⁹ *Dolan v. Moberly*, 17 Mo. App. 436; *Indianapolis etc. R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133; *Oldfield v. R. R. Co.*, 14 N. Y. 310; *Alabama etc. R. R. Co. v. Waller*, 48 Ala. 459; *State v. R. R. Co.*, 52 N. H. 528; but see *Lexington v. Lewis's Adm'r*, 10 Bush, 677.

¹⁰ *Chapman v. Rothwell*, 27 L. J. Q. B. 315; 4 Jur., N. S., 1180.

an action for the killing of a person by the use of deadly weapons, "not in self-defense," it must be alleged that the killing was not done in self-defense.¹ It is not necessary to allege that defendant's negligence was such that if death had not ensued the injured person would himself have been entitled to recover for the injury.² In an action for the death of the wife, the husband and the personal representative of the wife must join, under the Indiana statute.³ An action for the death of the deceased cannot be joined with an action by the plaintiff to recover for personal injuries received by himself, caused by the same negligent act.⁴

§ 1026. Contract and Tort—Waiving Contract and Suing in Tort.—The same act may amount to both a breach of a contract and a tort. Thus on a false and fraudulent warranty, the purchaser may sue for the breach of the warranty, or he may sue for the fraud, i. e., for the tort.⁵ So in the case of a common carrier, whose obligation by the law is to carry safely, but who may also contract to do so;⁶ so in the case of an innkeeper.⁷ Where there is an employment, which employment itself creates a duty, an action on the case will be for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast.⁸

ILLUSTRATIONS.—A person had by contract a right to float logs through another's dam, agreeing to pay for all damages

¹ *Becker v. Crow*, 7 Bush, 198.

² *Philadelphia etc. R. R. Co. v. State*, 58 Md. 372.

³ *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72.

⁴ *Cincinnati etc. R. R. Co. v. Chester*, 57 Ind. 297. But such joinder must be defeated before the answer is filed: *Chiles v. Drake*, 2 Met. (Ky.) 416; 74 Am. Dec. 406.

⁵ *Langridge v. Leny*, 2 Mees. & W.

519; *West v. Emery*, 17 Vt. 583; 44 Am. Dec. 356; *Ives v. Carter*, 24 Conn. 392; *Dobell v. Stevens*, 5 Dowl. & R. 490; *Newell v. Horn*, 45 N. H. 421; *Johnson v. McDaniel*, 15 Ark. 109.

⁶ See *Bailments—Carriers*, *post*, Division III.

⁷ See *Bailments—Carriers*, *post*, Division III.

⁸ *Courtenay v. Earle*, 10 Com. B. 83.

which he might do to the dam. He negligently injured the dam. Held, that he might be sued in tort for the injury: *Dean v. McLean*, 48 Vt. 412; 21 Am. Rep. 130.

§ 1027. **Waiving Tort and Suing on Contract.** — In some cases a party may treat a tort as also a breach of a contract, express or implied, and may, waiving the tort, sue for the breach of the contract.¹ Thus where by a tortious act a person has gotten possession of money belonging to another, the latter may sue him on an implied promise to repay it.² "If a man has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrong-doer, nor can he affirm his acts in part and avoid them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterward treat it as a wrong."³ In some courts it is held that *assumpsit* cannot be maintained unless the property wrongfully taken from the plaintiff has been converted into money;⁴ while in others

¹ *Young v. Marshall*, 8 Bing. 43; *Hall v. Peckham*, 8 R. I. 370.

² *Cooley on Torts*, 93; citing *Hall v. Peckham*, 8 R. I. 370; *Rand v. Nesmith*, 61 Me. 111; *Boston etc. R. R. Co. v. Dana*, 1 Gray, 83; *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290; *Howe v. Clancy*, 53 Me. 130; *Neat v. Harding*, 20 L. J., N. S., 250; *Hitchin v. Campbell*, 2 W. Black. 827; *Abbotts v. Barry*, 2 Brod. & B. 369; *Powell v. Rees*, 7 Ad. & E. 426; *Berley v. Taylor*, 5 Hill, 577; *Miller v. Miller*, 9 Pick. 34; 22 Am. Dec. 410; *Gilmore v. Wilbur*, 12 Pick. 120; *Appleton v. Bancroft*, 10 Met. 231; *Morrison v. Rogers*, 2 Scam. 317; *Staat v. Evans*, 35 Ill. 455; *Leighton v. Preston*, 9 Gill, 201;

Gray v. Griffith, 10 Watts, 431; *Goodenow v. Luyder*, 3 G. Greene, 599; *White v. Brooks*, 43 N. H. 402; *Lord v. French*, 61 Me. 420.

³ *Addison on Torts*, 94.

⁴ *Cooley on Torts*, 94; citing *Barlow v. Stalworth*, 27 Ga. 517; *Pike v. Bright*, 29 Ala. 332; *Emerson v. McNamara*, 41 Me. 565; *Noyes v. Loring*, 55 Me. 408; *Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Wolcott*, 2 Allen, 227; *Mann v. Locke*, 11 N. H. 246; *Smith v. Smith*, 43 N. H. 536; *Morrison v. Rogers*, 3 Ill. 317; *O'Reer v. Strong*, 13 Ill. 688; *Kelty v. Owens*, 4 Chand. 166; *Elliott v. Jackson*, 3 Wis. 649; *Stearns v. Dillingham*, 22 Vt. 624; 54 Am. Dec. 88; *Willett v. Willett*, 3 Watts, 277;

it is sufficient if the defendant has converted it in any way.¹

§ 1028. **Proximate and Remote Cause—In General.**—

A person is liable only for the proximate, and not for the remote, effect of his acts.² Proximate damages are defined, in a California case, in the following language: "A long series of judicial decisions has defined proximate or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual, and as therefore might have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not be reasonably anticipated, and over which the negligent party has no control."³ Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one "to recover *any* damage."⁴ Defendant's act charged to be negligent may be deemed the proximate cause of the injury complained of, if the injury might reasonably be expected to result. It is not enough to show merely that the injury was the natural consequence of the act.⁵ While the immediate cause of an accident may have been the break-

Pearsoll v. Chapin, 44 Pa. St. 9; Guthrie v. Wickliffe, 1 A. K. Marsh. 83; Fuller v. Duren, 36 Ala. 73; 76 Am. Dec. 318; Tucker v. Jewett, 32 Conn. 563; Sanders v. Hamilton, 3 Dana, 550; Ryers v. Greenbush, 57 Me. 441.

¹ Cooley on Torts, 95; citing Halleck v. Mixer, 16 Cal. 574; Cooper v. Berry, 21 Ga. 576; Randolph Iron Co. v. Elliott, 34 N.J. L. 184; Noyes v. Loring, 55 Me. 408; Watson v. Stever, 25 Mich. 386; Moses v. Arnold, 43 Iowa, 187; Miller v. Miller, 7 Pick. 133; 19 Am. Dec. 264; Budd v. Hiler, 27 N. J. L. 43; Stockett v. Watkins's Adm'r, 2 Gill & J. 326; Welch v. Bagg, 12 Mich. 42; Hill v. Davis, 3 N. H. 384; Floyd v. Wiley, 1 Mo. 430; Ford v. Caldwell, 3 Hill (S. C.), 248; Baker v. Cory, 15 Ohio, 9; Fiquet v. Allison,

12 Mich. 328; 86 Am. Dec. 54; Webster v. Drinkwater, 5 Me. 319; 17 Am. Dec. 238; Jones v. Buzzard, 1 Hemp. 240; Johnson v. Reed, 8 Ark. 202; Labeaume v. Hill, 1 Mo. 643; note to Putnam v. Wise, 1 Hill, 240; 37 Am. Dec. 309; note to 2 Greenl. Ev., sec. 108; Schweizer v. Weiler, 6 Rich. 159; Hudson v. Gilliland, 25 Ark. 180.

² Scott v. Shepherd, 3 Wils. 203; Henry v. R. R. Co., 50 Cal. 183; Harrison v. Berkly, 1 Strob. 525; 47 Am. Dec. 578; Fleming v. Beck, 48 Pa. St. 309; Isbell v. R. R. Co., 27 Conn. 393; 71 Am. Dec. 78.

³ McKinstry, J., in Henry v. R. R. Co., 50 Cal. 183.

⁴ Donnell v. Jones, 13 Ala. 490; 48 Am. Dec. 60.

⁵ Atkinson v. Transportation Co., 60 Wis. 141; 50 Am. Rep. 352.

ing of a chain, an act the unnecessary doing of which would probably cause the chain to break may be regarded as the proximate cause of the accident.¹ If, by reason of the engineer's negligence, the engine strikes a cow, and the cow rebounds and strikes a woman, the negligence of the engineer is the proximate cause of the injury to the woman.² Where a child fell into an excavation negligently left open on a public sidewalk, and was hurt by striking upon broken glass at the bottom, it was held that the defect in the sidewalk was the proximate cause of injury.³ In a recent English case, certain cattle of the plaintiffs were driven along the road, across which were some sidings belonging to the defendants, when some trucks of defendants were allowed to run down it, across the road, separating the cattle from the drovers, and frightening them so that some of them ran down the road, broke through an imperfect fence into an orchard, whence they strayed upon defendants' railroad and were killed by a passing train. The court of appeal, affirming the decision of the court of queen's bench, held that the defendants were liable, and that the damage was not too remote.⁴

¹ *King v. R. R. Co.*, 25 Fed. Rep. 799.

² *Alabama etc. R. R. Co. v. Chapman*, 80 Ala. 615.

³ *City of Galveston v. Posnainsky*, 62 Tex. 118; 50 Am. Rep. 517.

⁴ *Sneesby v. R. R. Co.*, L. R. 9 Q. B. 263. Said Lord Blackburn, in this case: "The question is, Are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote? No doubt the rule of our law is, that the immediate cause, the *causa proxima*, and not the remote cause, is to be looked at; for, as Lord Bacon says, 'It were infinite for the law to judge the causes of causes, and their impulses one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree': Bac. Max. Reg. 1. The rule is

sometimes difficult to apply, but in a case like the present, this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened and escaped. The natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was, that it would not be got back at all. So if you have lost control of cattle, and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them."

ILLUSTRATIONS.—A is passing along the street in his chaise, when the dog of B leaps at his horse; the horse takes fright and becomes unmanageable; in endeavoring to restrain him, a rein is broken; in consequence of this the chaise is dashed against a post and broken. The attack of the dog, and not the breaking of the rein, is the proximate cause of the injury; and under a statute making the owner of vicious dogs liable for damages caused by them, B must pay damages to A: *Sherman v. Favour*, 1 Allen, 191. The driver of a buggy, in turning from one street into another, got one of the lines entangled under the horse's tail, causing the horse to back and fall into a hole in the embankment on which the street was built. *Held*, that the municipality was liable for the consequent injury: *Hull v. City of Kansas*, 54 Mo. 598; 14 Am. Rep. 487. A well-broken horse, frightened by the carriage striking raised logs in the traveled part of the highway, became uncontrollable, ran away, and one hundred and twenty-five feet distant threw out and injured the driver. *Held*, that the defect in the highway was the proximate cause of the injury: *Clark v. Lebanon*, 63 Me. 393. The balustrade on a flight of stairs in defendant's dry-goods store was obstructed by display figures, so that plaintiff, a customer, was unable to get hold of it, and fell in consequence. *Held*, that defendant was liable: *Larkin v. O'Neill*, 48 Hun, 591. An ox escapes from his owner's inclosure upon a railroad track, by reason of the neglect of the company to fence their track at a given point. It is thence driven by an employee of the company into another man's pasture, from which it strays across its owner's land, outside of his inclosure, onto another part of the track, and is there killed, six hours in the mean time having intervened. *Held*, that the company is liable for the damages, although at the time the ox is killed its locomotive is being driven with proper care: *Gilman v. R. R. Co.*, 60 Me. 235. In consequence of the neglect of A to maintain a fence which he was bound to maintain, the horse of A strayed into the field of B, and there kicked and injured a horse of B. *Held*, that A was liable to B; the damages were not too remote: *Lee v. Riley*, 11 Jur., N. S., 527. A, whose duty it is to maintain a division fence, constructs the fence with old wire rope; this decays by rust, and some of the fragments fall on B's land, and are swallowed by B's cow, causing her death. *Held*, that A is liable to B for the loss of the cow: *Firth v. Bowling Iron Co.*, L. R. 3 C. P. D. 254. A, being under a prescriptive obligation to maintain a fence between his own close and that of B, suffers, unknowingly, such fence to be broken down; by reason of this, B's cow escapes into A's close, and there eats some leaves of a yew-tree, and is killed. *Held*, that A is liable to B: *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. A

steam-whistle on a locomotive is sounded under a bridge while a traveler is passing over it, whereat his horses take fright, run away, and he is injured. The negligence of the servant of the company is the proximate cause of the injury, and the company must pay damages: *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346. A moored his barges, loaded with coal, in the middle of a stream, making them fast to a bridge below. In this position, if any of them should sink, it would probably work injury to the barges of others. One of them sank, by an accident which did not involve negligence in A, and in sinking lodged against and settled under the barges of B, which, when the water subsided, were thereby injured. A was liable to B: *McGrew v. Stone*, 53 Pa. St. 436. A fire breaks out in the building of A; in order to get water to it, the firemen are obliged to lay their hose across a railway track; a train comes along and cuts the hose in two, although the servants of the railway company in charge of the train have notice that the hose is there, and have time to stop the train until it can be uncoupled and removed from the track; by reason of the hose being thus cut, the building is consumed. If the hose had not been cut, the fire would probably have been extinguished. *Held*, that the cutting of the hose is a proximate cause of the destruction of A's building, and the railway company must pay damages to A: *Metallic Comp. Casting Co. v. R. R. Co.*, 109 Mass. 277; 12 Am. Rep. 689. B, in the entry to a school-room, seized A by the arm, swung him around, and let him go, thereby throwing him violently against C, who instantly pushed him away and against a hat-hook, which injured him. *Held*, that A could maintain an action of trespass against B: *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267.

§ 1029. **Intervening Causes.**—If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent.¹ The wrong-doer is liable for

¹ Cooley on Torts, 70; Balt. etc. R. R. Co. v. Reaney, 42 Md. 117; Goshen Tp. Co. v. Sears, 7 Conn. 86; Morse v. Richmond, 41 Vt. 435; 98 Am. Dec. 600; Seigel v. Eisen, 41 Cal. 109; Tucker v. Henniker, 41 N. H. 317; Winship v. Enfield, 42 N. H. 197; Woodward v. Aborn, 35 Me. 271; 58 Am. Dec. 699; Macauley v. New York, 67 N. Y. 602; Thomas v. Hook, 4 Phila. 119; Holley v. Winooski Turnpike Co., 1 Aiken, 74; Byrne v. Wilson, 15 I. C. L. R. 332; Hunt v. Pownall, 9 Vt. 411; Powell v. Deveny, 3 Cush. 300; 50 Am. Dec. 738; Joliet v. Verley, 35 Ill. 58; 85 Am. Dec.

all the effects of his act,¹ unless they are the result of the negligence of the injured person.² Thus when one is injured by the negligence of another, the latter is responsible for any aggravation of the hurt caused by the neglect of a physician, provided the plaintiff was not negligent in selecting him.³ Where one is injured by the negligence of another, and the injury renders the system more susceptible to disease, and less able to resist it, and death results from such disease, such death is legally attributable to such negligence.⁴ If the original wrong becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the first wrong as the proximate cause,⁵ provided, however, that the intervening act was one which the defendant should either have anticipated or have guarded against.⁶ If the doing of a particular act is forbidden by law, and an agent for which the defendant is not responsible intervenes, and conforming with the defendant's unlawful act, but without negligence on his part, produces an injury, he (the defendant) will be responsible;⁷ provided, however, that

342; *Lacon v. Page*, 48 Ill. 499; *Aurora v. Pulfer*, 56 Ill. 270; *Palmer v. Andover*, 2 Cush. 600; *Titcomb v. R. R. Co.*, 12 Allen, 254; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; 3 Am. Rep. 663; *Lords Bailiff-Jurats of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204; L. R. 7 Ex. 247; *Atchison v. King*, 9 Kan. 550; *Clark v. Barrington*, 41 N. H. 52; *Kelsey v. Glover*, 15 Vt. 708; *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Hull v. Kansas City*, 54 Mo. 598; 14 Am. Rep. 487; *Ward v. North Haven*, 43 Conn. 148; *Baldwin v. Tp. Co.*, 40 Conn. 238; 16 Am. Rep. 33. As to the rule in regard to defects in highways, see Division V., *Municipal Corporations*, *post*.

¹ Thompson on Negligence, 1091.

² See *Contributory Negligence*, *post*.

³ *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. Rep. 200; *Rice v. Des Moines*, 40 Iowa, 638; *Stover v. Bluehill*, 51 Me. 439; *Eastman v. Sanborn*, 3 Allen, 594; 81 Am. Dec. 677; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; 50 Am. Rep. 601; *Loeser v. Humphrey*, 41 Ohio St. 378; 52 Am. Rep. 86.

⁴ *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168.

⁵ Thompson on Negligence, 1089.

⁶ Thompson on Negligence, 1089; *Carter v. Towne*, 103 Mass. 507; *Parker v. Cohoes*, 10 Hun, 531; *Davidson v. Nichol*, 11 Allen, 514.

⁷ *Clark v. Chambers*, L. R. 3 Q. B. D. 327; *Salisbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Dickinson v. Boyle*, 17 Pick. 78; 28 Am. Dec. 281; *Woodward v. Aborn*, 35 Me. 271; 58 Am. Dec. 699.

the intervening agency was one the defendant was bound to anticipate.¹ If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury.² In an action brought to recover damages caused by the falling of lumber, which is alleged to have been carelessly piled by the defendant, if the lumber was thus carelessly piled up, the facts that it remained in that condition a long time before the injury, and that the lumber was caused to fall by the negligence of a stranger, are no defense; for the negligence of the defendant, concurring with the negligence of the stranger, is the direct and proximate cause of the injury.³ It is not relevant that the plaintiff or defendant were at the time of the injury engaged in violating the law.⁴

¹ *Bosworth v. Brand*, 1 Dana, 377; *Sharp v. Powell*, L. R. 7 Com. P. 253.

² *Cooley on Torts*, 79; *Bartlett v. Boston Gas Co.*, 117 Mass. 533; 19 Am. Rep. 421; *Burrows v. Gas Co.*, L. R. 5 Ex. 57; L. R. 7 Ex. 96; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Philadelphia v. Weller*, 4 Brewst. 24; *Carpenter v. R. R. Co.*, 11 Abb. Pr., N. S., 416; *Eaton v. R. R. Co.*, 11 Allen, 500; 87 Am. Dec. 730; *Illidge v. Goodwin*, 5 Car. & P. 190; *Lynch v. Nurdin*, 1 Q. B. 29; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Peck v. Neil*, 3 McLean, 26; *Smith v. Dobson*, 3 Scott N. R. 336; *Congreve v. Morgan*, 18 N. Y. 84; 72 Am. Dec. 495; *Irvin v. Fowler*, 5 Robt. 482; *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267; *Wheeler v. Worcester*, 10 Allen, 591; *Chapman v. R. R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344; *Colgrove v. R. R. Co.*, 20 N. Y. 492; *Barrett v. R. R. Co.*, 45 N. Y. 628; *McMahon v. Davidson*, 12 Minn. 357. Some exceptions to the general rule are to be found in the books. Thus where dogs of several owners commit a trespass, each owner is not liable for the whole damage, but only for what his own dog did.

See Division III., Title Animals, *ante*. "Another exception," says Judge Thompson (*Thompson on Negligence*, 1088), "exists in England and in some American courts, in cases where the relation of the person injured to one of the parties doing the injury is such that they are deemed to be identified, in a juridical sense, with each other; as where the goods of A on board the vessel of B, A's carrier, are lost by reason of a collision between the vessel of B and the vessel of C, the pilots of both vessels being negligent; or where A, a passenger on board B's train of cars, is injured by B's train coming in contact with the train of C, the servants of both companies being negligent. Here A may recover damages of B, but not of C. Nor does this doctrine apply in case of actions for damages, under the statutes of Massachusetts, for injuries sustained by travelers in consequence of negligence of towns in suffering their highways to get out of repair": *Shepherd v. Chelsea*, 4 Allen, 113.

³ *Pastene v. Adams*, 49 Cal. 87.

⁴ *Thompson on Negligence*, 1093; *Welch v. Wesson*, 6 Gray, 505. But *aliter*, in some of the New England states, as to Sunday traveling: See Division III., Contracts—Sunday.

ILLUSTRATIONS. — A horse took fright from the carriage striking an obstruction in a way, and became unmanageable, and ran away, injuring the driver. *Held*, that the obstruction was the proximate cause of the injury: *Clark v. Lebanon*, 63 Me. 393. A man in a balloon landed in private grounds, attracting thereon a crowd of people, who trampled and destroyed the flowers and plants. *Held*, that he was liable for the damage: *Guille v. Swan*, 19 Johns. 381; 10 Am. Dec. 234. A negligently leaves his horse unhitched in a crowded street. The horse runs away, and, while going violently down the street, people run towards it, endeavoring to stop it. This causes the horse to swerve from the course it is taking, and brings it into contact with the horse and sleigh of B, causing damage to B. *Held*, A is answerable for the damage which B has thus sustained: *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199. A, a dealer in lumber, negligently piled some timbers on each other near a passage-way. A wheel of the wagon of B, a customer, casually caught in a timber projecting from the pile, and threw the whole structure down upon C, another customer. The timbers had been thus piled several months before the accident. *Held*, that the negligence of A was the proximate cause of the injury to C: *Pastene v. Adams*, 49 Cal. 87. Hoisting-shears were held in position by two guys. A stevedore cast the front guy loose, and did not refasten it. The next day, some boys swung on the rear guy, and caused the shears to fall and break. They would not have fallen but for the swinging of the boys, and the swinging of the boys would not have caused them to fall had the stevedore refastened the front guy. *Held*, that the stevedore was not liable for the injury to the shears caused by the fall: *Tutein v. Hurley*, 98 Mass. 211; 93 Am. Dec. 154. A negligently piled boards on the traveled part of a highway. B, driving along, ran over the boards, and the contents of his wagon produced a rattling noise, which frightened C's horse, causing him to jump, and threw C out of his wagon. The horse was a well-broken horse and well driven. In an action by C against A, *held*, that a nonsuit was improper: *Lake v. Milliken*, 62 Me. 240; 16 Am. Rep. 456. The defendant put a dangerous spiked hurdle in a private road over which he and others had rights of way. Some person, without the knowledge of the defendant, moved the hurdle a few yards. On a dark night, the plaintiff, who was not a trespasser, without negligence, and thinking to avoid the original position of the hurdle, came into collision with it, and was injured. *Held*, that the plaintiff could recover from the defendant: *Clark v. Chambers*, L. B. 3 Q. B. D. 327. A sign, hung over a street in a city, with due care as to its construction and fastenings, but in violation of a city ordinance which subjected its owner

to a penalty for placing and keeping it there, was blown down by the wind in an extraordinary gale, and, in its fall, a bolt which was part of its fastenings struck and broke a window in a neighboring building. *Held*, that the owner of the sign was liable for the injury to the window: *Sailsbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354. The defendant had, contrary to the provisions of the police act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating through which the water flowing down the gutter passed into the sewer had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and had been frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. *Held*, that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened: *Sharp v. Powell*, L. R. 7 Com. P. 253. Through the negligence of a gas company, a leakage of gas occurs in the cellar of A, a consumer. At the request of A, B, a gas-fitter, sends his servant to examine and repair the leak. Through the negligence of B's servant, the gas which has thus escaped in A's cellar explodes, doing damage to A. The gas company must answer to A for this damage: *Burrows v. Gas Co.*, L. R. 5 Ex. 67; L. P. 7 Ex. 96. A leaves his horse and cart standing in the street, without any person to watch them, and a passer-by strikes the horse, in consequence of which damage ensues. *Held*, that A is answerable for such damage: *Illidge v. Goodwin*, 5 Car. & P. 190. An omnibus overturns, precipitating a passenger into the lock of a canal. A third person, for whose acts the proprietor of the omnibus is not responsible, lets the water into the canal, in consequence of which the passenger is drowned. *Held*, that the proprietor of the omnibus must pay damages for the death of the passenger: *Byrne v. Wilson*, 15 I. C. L. R. 332. Two independent contractors were negligent in performing their respective portions of the work, so that an accumulation of water entered the plaintiff's cellar, damaging his goods. It could not be ascertained how much of the water was caused to flow by the negligence of each contractor. One of them was sued. *Held*, that he was held liable for the whole damage: *Slater v. Mersereau*, 64 N. Y. 138. A horse is frightened by a moving street-car, and runs away, and the driver is injured by collision with a dangerous obstruction in the street. *Held*, that the obstruction is the proximate cause:

Campbell v. Stillwater, 32 Minn. 308; 50 Am. Rep. 567. A person is by contract entitled to all the articles to be manufactured by a certain company, he furnishing the raw materials. *Held*, that he cannot maintain an action against a trespasser who stops the machinery of the company, and obstructs it in performing the contract: *Dale v. Grant*, 34 N. J. L. 142. A directs his agent to erect a building for him on a certain spot. B, by false representations regarding the boundary line, induces the agent in the owner's absence to begin work elsewhere. A has no remedy against B: *Silver v. Frazier*, 3 Allen, 382; 81 Am. Dec. 662. A bridge having become impassable, one who desired to carry wood across piled it on the levee to await opportunity. A flood carried it off. Suit was brought for the loss, as being occasioned by the non-repair of the bridge. *Held*, too remote: *Dubuque Wood etc. Association v. Dubuque*, 30 Iowa, 176. Defendant corporation laid an eight-inch gas main on the bed of a navigable river, instead of under it. A steamboat grounded her bow on a small hidden lump on the river-bed, and was swung round till she stuck fast on the gas-pipe. In trying to pull her off by warping, the gas-pipe broke, and the boat was burned, and libelants injured. *Held*, that the injuries were caused proximately by defendant's wrongful act: *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354. Fire was negligently allowed to fall from a locomotive on defendant's elevated railroad upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse was frightened, and ran away. The driver attempting to drive him against the curbstone to stop him, the wagon passed over the curbstone and injured plaintiff, who was on the sidewalk. *Held*, that he might recover therefor: *Lowery v. R. R. Co.*, 99 N. Y. 158; 52 Am. Rep. 12. The defendant unlawfully obstructed a street by a train of cars. The plaintiff, desiring to pass, walked around the rear of the train, entered another street, obstructed by ice placed there by the defendant in clearing its track, which was laid also in that street, fell upon the ice, and was injured. There were other available routes to her destination. *Held*, that the injury was the proximate result of the ice: *Railway Co. v. Staley*, 41 Ohio St. 118; 52 Am. Rep. 74.

§ 1030. Not Liable for Remote or Unexpected Damage.

— If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the

wrong and the damage are not sufficiently conjoined as cause and effect to support an action.¹

ILLUSTRATIONS.—Common carriers undertook to transport goods from Philadelphia to Pittsburgh by canal. While on their way, the goods were destroyed by an extraordinary flood. The goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat. *Held*, that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse was not the proximate cause of the loss: *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695. A railroad train running behind time was upset by a gale of wind, and the plaintiff was injured. Had the train been on time the gust would not have reached it. *Held*, that the injury could not be attributed to the delay as the proximate cause, and the railroad company was not liable: *McClary v. R. R. Co.*, 3 Neb. 44; 19 Am. Rep. 631. A man mounts a pile of flag-stones in a public street to make a speech. A crowd of hearers gather about him, some of whom also get on the stones, and break them. *Held*, that the speaker was not, as matter of law, liable for the damages; but whether his conduct was the proximate cause of the damage was a question for the jury: *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664. A water-works company stops up a public foot-way, so that persons having occasion to pass that way trespass upon the land of B, and beat down his herbage. *Held*, that B has no cause of action against the company: *Blaggrave v. Water Works Co.*, 1 Hurl. & N. 369. A person negligently suffers his fence to get out of repair, whereby his neighbor's horse escapes into his close, and is there killed by the accident of a hay-stack falling upon him. *Held*, that he is liable: *Powell v. Salisbury*, 2 Younge & J. 391. A goes to the house of B, a neighbor, at nightfall, and quarrels with B on the porch of B's house, using violent, threatening, and abusive language.

¹ Addison on Torts, 6; Rigby v. N. H. 528; Phillips v. Dickerson, 85 Hewitt, 5 Ex. 240; Fairbanks v. Ill. 11; 28 Am. Rep. 607; Morrison v. Kerr, 70 Pa. St. 86; 10 Am. Rep. 664; Davis, 20 Pa. St. 171; 57 Am. Dec. McGrew v. Stone, 53 Pa. St. 436; 695; the court saying: "A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability." Scott v. Hunter, 46 Pa. St. 192; 84 Am. Dec. 542; Lake v. Milliken, 62 Me. 240; 16 Am. Rep. 456; Stark v. Lancaster, 57 N. H. 83; Atchison etc. R. R. Co. v. Stanford, 12 Kan. 354; 15 Am. Rep. 362; Marble v. Worcester, 4 Gray, 395; Bennett v. Lockwood, 20 Wend. 223; 32 Am. Dec. 532; Proctor v. Jennings, 6 Nev. 83; 3 Am. Rep. 240; Doggett v. R. R. Co., 78 N. C. 305; State v. R. R. Co., 52

In consequence of this, B's wife, abed in the house, becomes so frightened that she gives premature birth to a child. *Held*, that A is not liable to B for this, as it is not a natural and probable consequence of his violent conduct: *Phillips v. Dickerson*, 85 Ill. 11; 28 Am. Rep. 607. Plaintiff owned houses which were separated from a river by a street only. Defendant, a railroad company, filled up a part of the river in front of these houses, and occupied the same and a part of the street with tracks and buildings. Plaintiff's houses took fire and were destroyed, because the firemen were unable to reach and procure water from the river by reason of such obstructions caused by defendant. *Held*, that defendant's acts were not the proximate cause of plaintiff's loss, and that defendant was not liable even though his acts were unlawful: *Bosch v. R. R. Co.*, 44 Iowa, 402; 24 Am. Rep. 754. The defendant was in possession of a partially inclosed piece of public land, on which he was pasturing his cattle. The plaintiff drove his cattle through defendant's inclosure onto the same land for the purpose of pasturage, from which they were driven by defendant. They afterwards roamed on land claimed by one G, who gave notice to plaintiff to come and take them, which he neglected to do, and many of them died from starvation. *Held*, that the loss of the cattle was not the proximate result of the defendant's trespass: *Story v. Robinson*, 32 Cal. 205. Defendant sold gunpowder to a boy eight years old, who, in the absence of his parents, took it home, and placed it in a cupboard. Afterwards, with the knowledge and consent of his mother, he fired some of it off; a few days later he did so again, and was injured by the explosion. *Held*, that the injury was not the proximate result of the sale of the powder: *Carter v. Towne*, 103 Mass. 507. The defendant's bartender sold liquor to B, and an altercation ensuing, threw a glass at B, which missed him and injured plaintiff. *Held*, that the injury was not the proximate consequence of the sale of the liquor: *Lueken v. People*, 3 Ill. App. 27. By the collision of trains in Virginia, a passenger was so injured that he became insane, and eight months after the accident, committed suicide. *Held*, that his own act was the proximate cause of his death, and that the company was therefore not liable: *Scheffer v. R. R. Co.*, 105 U. S. 249. P. fastened his horse with a stout rope by the side of a public street; a steam-whistle upon the top of U.'s factory, about fifteen rods distant, was blown as a notice to the operatives, producing a sound shrill and calculated to frighten ordinary horses. The horse pulled violently at his rope, which gave way, and he was killed. It was found that if the whistle had not been sounded, the horse would not have pulled; and that if the horse had been free from the habit of pulling, he would not have been killed. *Held*, that the death

of the horse could not be regarded as caused by the negligence of U., and that he was not liable: *Parker v. Woolen Co.*, 42 Conn. 399. A passenger, on leaving a train at night which had stopped a short distance beyond the station, was misinformed as to its position by the conductor. Instead of going back, he went on, being familiar with the neighborhood, and intending, by crossing a cattle-guard, to come upon a cross-road; but finding that he was beyond the road, turned back to reach it by crossing a similar cattle-guard on that side, into which he fell and was injured. *Held*, that the defendant's negligence was not the proximate cause of the injury: *Lewis v. R. R. Co.*, 54 Mich. 55; 52 Am. Rep. 790. A train wrongfully obstructed a street crossing; animals were thus prevented from crossing, and while they stood waiting on the other track, another train came along and injured them. *Held*, the obstruction was not the proximate cause of the injury: *Brown v. R. R. Co.*, 20 Mo. App. 222. A bridge erected over a slough of the Mississippi River, and as a part of the highway from the business part of the city of Dubuque to a levee on that river, became impassable for want of repairs, by reason of which the plaintiff was unable to transport over it a lot of wood which had been collected at the levee, for that purpose, and the same was, while lying there under these circumstances, washed away by a freshet. *Held*, that the damages were too remote: *Dubuque Wood etc. Ass'n v. Dubuque*, 30 Iowa, 176. The defendant left a train of cars standing entirely across a highway crossing near its station, and the plaintiff, desiring to reach the station, undertook to drive with a horse and cart at a point where there was no crossing and the track was raised above the ground, and he was thrown off by the jostling of the cart, and injured. *Held*, that the injury was not the proximate result of the defendant's conduct: *Jackson v. R. R. Co.*, 13 Lea, 491; 49 Am. Rep. 663. A sleigh was overturned by an ash-heap in a highway, and the horses attached ran away, and about five or six miles distant, and a mile from any highway, they were killed by a railroad-locomotive. *Held*, that the negligence of the township, if any, was not the proximate cause: *Township of West Mahanoy v. Watson*, 112 Pa. St. 574; 56 Am. Rep. 336. A well-broken horse, while being carefully driven, suddenly shied at a bird in the bushes, and jumped several feet from the usually traveled portion of a bridge, and broke through a defective part. *Held*, that the shying was not the proximate cause of the injury, and the town was liable: *Aldrich v. Gorham*, 77 Me. 287. C. shot and killed a dog on the highway near the house of R., whose wife, unknown to C., was near by, and, being in delicate health, was so frightened that she fell sick. *Held*, that the act of killing the dog was not the proximate cause of the injury to

the wife of R.: *Renner v. Canfield*, 36 Minn. 90. Defendant procured from plaintiff a letter introducing D. to plaintiff's agent in Central America, defendant representing that D. was going there on a pleasure trip, when, in fact, D. and the defendant were engaged in an expedition hostile to the government of that country. By reason of D.'s conduct, plaintiff's property in Central America was seized and held for a time by United States vessels. *Held*, that plaintiff's losses were not the proximate result of defendant's conduct toward plaintiff: *Jex v. Strauss*, 55 N. Y. Sup. Ct. 52.

§ 1031. **In the Case of Fires.**—The same principles apply in the case of a fire spreading; the person or corporation negligently starting it is liable for all the damage it does in its travel provided no unexpected and unusual agency intervenes.¹ Where a fire originates in the care-

¹ *Atchison etc. R. R. Co. v. Bales*, 16 Kan. 252; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Dec. 362; *St. Joseph etc. R. R. Co. v. Chase*, 11 Kan. 47; *Baltimore etc. R. R. Co. v. Shipley*, 39 Md. 251; *Doggett v. R. R. Co.*, 78 N. C. 305; *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Kellogg v. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69. Two cases holding a contrary rule (*Pennsylvania etc. R. R. Co. v. Kerr*, 62 Pa. St. 353; 1 Am. Rep. 431; and *Ryan v. R. R. Co.*, 35 N. Y. 210; 91 Am. Dec. 50) are opposed to all the other authorities on this subject. And see *Reiper v. Nichols*, 31 Hun, 491; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; 50 Am. Rep. 71; *Toledo etc. R. R. Co. v. Mathersburg*, 71 Ill. 572. The *Kerr* and *Ryan* cases are criticised with great force by Lawrence, C. J., in *Fent v. R. R. Co.*, 59 Ill. 349; 14 Am. Rep. 13. If these two decisions, says the chief justice, "are correct law, it must be held that if fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, while A must be reimbursed by the company, B must set his loss down as due to a remote cause, and suffer in uncomplaining silence. Would there not be, in such a decision, a sense of palpable wrong, which would justly shock the public conscience, and impair the confidence of the community

in the administration of the law? While the law to be administered by the courts should not be a mere reflex of uneducated public opinion, at the same time it should be the expression of a masculine common sense, and its decisions should not be founded on distinctions so subtle that they might have afforded fitting topics to the school-men. If the field of A contains forty acres, and the whole is overrun by fire, he may recover for the whole. But if A owns twenty acres next to the railway, and B the remaining twenty acres of the same field, A shall recover, according to the doctrine of these cases, but B shall not. Yet the test question is, What is the proximate cause of the fire? and this ruling makes the proximate cause depend upon whether the field of forty acres is owned by one person or by two. Let us suppose another case. Both these opinions upon which we are commenting expressly admit, as both courts have decided, that if, through the negligence of a railway company, fire is communicated to the building of A, he may recover. But suppose the building is a wooden tenement one hundred feet in length extending from the railway. In the *Pennsylvania* case, the second building was only thirty-nine feet from the first. We presume that court would hold, and appellee's counsel would admit, that

lessness of a defendant, and is carried directly by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or a running stream, to the plaintiff's property, and destroys it, the defendant is legally answerable for the loss.¹

Where fire is negligently started, and is not immediately communicated to the property destroyed, but is communicated from one building to another until it reaches the property destroyed, causal connection will only cease when between the negligence and the damage an object is interposed which would have prevented the damage if due care had been taken.² An act of negligence, whereby a fire was set which spread to plaintiff's

A might recover for the value of his entire building, one hundred feet in length. But suppose B owns the most remote fifty feet to the building, could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any court or text-writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be 'the natural and proximate consequence of the act complained of.' Is not the burning of the second fifty feet of the building, in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building, as well as for the first, when there is one continuous building, and whether owned by one person or by two, is it possible that when the second fifty feet is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other, there can be no recovery? Is not the burning of the second building still 'the natural and proximate consequence of the act complained of'? It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for

the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency, — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind, — such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible."

¹ Kuhn v. Jewett, 32 N. J. Eq. 647.

² Kuhn v. Jewett, 32 N. J. Eq. 647.

house, is not the less an act for which damages may be recovered because the fire first caught in shavings negligently left by a third person, or because the city was negligent in putting out the fire after it once started.¹ Thus in the following cases it has been ruled that the defendant starting the fire was liable for all the damage that it caused, viz.: Where fire caught from the sparks of the defendant's locomotive on the land of D. The defendant's servants were successfully extinguishing it when D. desired them to desist, as he wished to have it burn up the bogs. They desisted, but it communicated to and injured the plaintiff's adjoining land.² Where sparks were negligently thrown from the smoke-stack of a mill, and carried by a gale of wind in the direction of plaintiff's building. Plaintiff's building, however, was actually fired by sparks and cinders from an intervening building two hundred feet away, which was fired directly from the sparks from the mill.³ Where a locomotive set fire to the grass near the track; the fire crossed the land of B, C, and D before it reached the property of A.⁴ Where sparks escaped from the engine to a carpenter's shop which was close to the track, which was consumed, the fire being carried across a street sixty feet wide to the dwelling-house of A.⁵ Where fire from a locomotive having been communicated to the barn of B, it was carried through a shed to the barn of A.⁶ Where B's bridge and A's bridge were situated fifty-eight feet apart; B's bridge was set on fire by sparks which came from B's engine, and the fire was communicated to A's bridge.⁷ Where a fire commenced on the defendant's track, in some dry grass, and spread up the adja-

¹ *Atkinson v. Transportation Co.*, 60 Wis. 141; 50 Am. Rep. 352.

² *Simmonds v. R. R. Co.*, 52 Conn. 264; 52 Am. Rep. 587.

³ *Adams v. Young*, 44 Ohio St. 80; 58 Am. Rep. 789.

⁴ *Purley v. R. R. Co.*, 98 Mass. 418; 96 Am. Dec. 645; *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299; 23

Am. Rep. 214; *Henry v. R. R. Co.*, 50 Cal. 176.

⁵ *Hart v. R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719. See *Hoyt v. Jeffers*, 30 Mich. 181.

⁶ *Ingersoll v. R. R. Co.*, 8 Allen, 438.

⁷ *Hookset v. R. R. Co.*, 38 N. H. 243.

cent bank, over its right of way, to A's wood, a part of which was situated within fifty feet, and a part within two hundred feet of the track, and destroyed it.¹ Where sparks escaped from the defendant's locomotive, and fell upon the ground of an adjoining proprietor, which was covered with broom-sedge and dry grass; it burned across this lot about one hundred and fifty yards to the land of A, where it consumed a fence and some dry grass, and spreading from these, destroyed a quantity of young timber and fence-rails, the property of A.² Where a quantity of grass on the line of a railroad was set on fire by sparks from a locomotive; the fire spread until it reached the farm of A, situated nearly a mile from the railroad track, where it destroyed some timber belonging to A.³ Where B's elevator, which was situated within twenty feet of the defendant's track, was burned by sparks which escaped from one of its engines; the fire spread to the elevator of A, situated seventy feet distant, and destroyed it.⁴ Where A's house stood one hundred feet from the railroad track, a quantity of shavings being gathered around it, sparks were blown by a high wind into the dead grass adjoining the track, from whence they were communicated to the shavings and the building.⁵ Where fire escaped from a railroad-locomotive and fell upon a strip of ground forty or fifty yards wide, which was covered with dry grass and other combustible matter; it spread from thence and destroyed A's fence.⁶ Where sparks from the defendant's locomotive set fire to the prairie along its right of way; the grass being dry and the wind high, the fire extended about three miles during the evening and night, burning slowly during the night, when the wind had fallen; next morning, the wind, rising, carried the fire

¹ Annapolis etc. R. R. Co. v. Gantt, 39 Md. 115.

² Phila. etc. R. R. Co. v. Constable, 39 Md. 149.

³ Burlington etc. R. R. Co. v. Westover, 4 Neb. 268.

⁴ Small v. R. R. Co., 6 Cent. L. J. 310.

⁵ Coates v. R. R. Co., 61 Mo. 38.

⁶ Clemens v. R. R. Co., 53 Mo. 366; 14 Am. Rep. 460.

some five miles farther, when it reached A's farm and destroyed his property.¹

ILLUSTRATIONS. — The defendant's locomotive, in passing through a village, threw out great quantities of unusually large cinders, which set on fire two buildings and a lumber-yard. The weather was very dry, and the wind blowing freely from the south. One of the buildings thus ignited was a warehouse near the track. From this the heat and flame speedily communicated to a building of the plaintiffs, situated about two hundred feet distant, whereby it and most of its contents were consumed. There was evidence of negligence on the part of the servants of the defendant. *Held*, that the negligence of the servants of the defendant was the proximate cause of the loss sustained by the plaintiffs: *Fent v. R. R. Co.*, 59 Ill. 349; 14 Am. Rep. 13. Sparks from defendant's locomotive set fire to prairie along defendant's line of railway, on evening of the 23d of November, 1872. The grass being rank and dry and wind high, fire extended about three miles during that evening and night, burning more slowly during night, because wind had been less violent. Next morning, wind arose again, and blew hard, as was not unusual in that country (southwest Missouri), and carried the fire some five miles farther, whence it reached plaintiff's farm, and destroyed property of plaintiff. In an action for damages for destruction of plaintiff's property through negligence of defendant's railway, *held*, that the damage by fire must be considered as the direct and natural result, such as would be reasonably anticipated, and that the high wind at that season of the year, although aiding in the spread of the fire, was neither extraordinary nor remarkable, and could not be regarded as the introduction of a new agency: *Poeppers v. R. R. Co.*, 67 Mo. 715; 29 Am. Rep. 518. Sparks from a locomotive set fire to combustible material on the right of way. The fire spread toward A's land, and A's fifteen-year-old daughter was burned to death in trying to put it out. *Held*, that an action was not maintainable against the railroad company: *Seale v. R. R. Co.*, 65 Tex. 274; 57 Am. Rep. 602.

§ 1032. **Law and Fact.**—When it is doubtful as to whether damages are proximate, or speculative and remote, the question should be submitted to the jury, under proper instructions.²

¹ *Poeppers v. R. R. Co.*, 67 Mo. 715; 366; 14 Am. Rep. 460; *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Patten v. R. R. Co.*, 32 Wis. 524; *Hoag v. R. R. Co.*, 85

² *Thompson on Negligence*, 1100, citing *Clemens v. R. R. Co.*, 53 Mo. 324.

§ 1033. **Remedies by Act of Party — Abatement of Nuisance.** — In the case of a private nuisance or a public one from which he suffers a special injury, the party injured may abate it; that is, he may himself remove it.¹ If it is a private nuisance, any person injured by its continuance may abate it.² If it is a public nuisance, it is essential that the person shall have suffered a special injury not suffered by the whole public, for in the latter case the public officers, and not the individual, must abate it.³ "When any public way is unlawfully obstructed, any individual who wants to use it in a lawful way may remove the

Pa. St. 293; 27 Am. Rep. 653; Scott v. Hunter, 46 Pa. St. 192; 84 Am. Dec. 542; Saxton v. Bacon, 31 Vt. 540; Tuff v. Warman, 2 Com. B., N. S., 739; Lake v. Milliken, 62 Me. 240; 16 Am. Rep. 456; Stark v. Lancaster, 57 N. H. 88; Willey v. Belfast, 61 Me. 569; Stark v. R. R. Co., 57 N. H. 88; Penn. etc. R. R. Co. v. Lacey, 89 Pa. St. 458.

¹ Burnham v. Hotchkiss, 14 Conn. 310; Rung v. Shoneberger, 2 Watts, 23; 26 Am. Dec. 95; Gates v. Blincoe, 2 Dana, 158; 26 Am. Dec. 440; Manhattan Mfg. Co. v. Van Kursen, 23 N. J. Eq. 251; Barclay v. Com., 25 Pa. St. 503; 64 Am. Dec. 715; Rhea v. Forsyth, 37 Pa. St. 506; 78 Am. Dec. 441; Calef v. Thomas, 81 Ill. 478; Arundel v. McCulloch, 10 Mass. 70; Graves v. Shattuck, 35 N. H. 257; 69 Am. Dec. 536; Mohr v. Gault, 10 Wis. 513; 78 Am. Dec. 687; Larson v. Furlong, 63 Wis. 323; Amoskeag etc. Co. v. Goodale, 46 N. H. 53.

² Rung v. Shoneberger, 2 Watts, 23; 26 Am. Dec. 95; State v. Parrott, 71 N. C. 311; 17 Am. Rep. 5.

³ Burnham v. Hotchkiss, 14 Conn. 311; State v. Paul, 5 R. I. 185; Hopkins v. Crombie, 4 N. H. 520; Amoskeag Co. v. Goodale, 46 N. H. 53; Rung v. Shoneberger, 2 Watts, 23; 25 Am. Dec. 95; Philber v. Matson, 14 Pa. St. 306; Gates v. Blincoe, 2 Dana, 158; 26 Am. Dec. 440; Gray v. Ayres, 7 Dana, 375; 32 Am. Dec. 107; Selman v. Wolfe, 27 Texas, 68; Moffett v. Brewer, 1 Iowa, 348; Adams v. Beach, 6 Hill, 271; Lansing v. Smith, 8 Cow.

146; Rogers v. Rogers, 14 Wend. 131; Ely v. Supervisors, 36 N. Y. 297; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Hart v. Mayor, 9 Wend. 571; 24 Am. Dec. 165; Owens v. State, 52 Ala. 400; Clark v. Ice Co., 24 Mich. 508; Lincoln v. Chadbourne, 56 Me. 197; Brown v. Perkins, 12 Gray, 89; the court saying: "The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers being inhabitants of other parts of the commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases where the distinctions are more accurately made, and upon principle, this is the true rule of law: Lonsdale v. Nelson, 2 Barn. & C. 311; 3 Dowl. & R. 566; Mayor etc. of Colchester v. Brooke, 7 Ad. & E., N. R., 376; Gray v. Ayres, 7 Dana, 375; 32 Am. Dec. 107; State v. Paul, 5 R. I. 185."

obstruction.”¹ Every person who assumes to judge of and remove an obstruction to a highway, upon the ground that it is a nuisance, does so at his own risk; and if he misjudges, he is liable for the damages.²

A citizen has not the right to remove any obstruction on the public street or highway merely because such obstruction is a public nuisance. No such right exists in any person, except one who, apart from the injury which he, as one of the public, sustains in common with his fellow-citizens, is especially inconvenienced by the obstruction on the street.³ A building erected within the limits of a highway cannot be abated by individuals as a nuisance, unless it actually obstruct the passage.⁴ An obstruction placed in a private road by the owner of land over which it is laid cannot be removed by one having no right to use the road.⁵ Adjacent land-owners may lawfully use the space between the carriage-path and sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property especially protected by statute; and if they are injured or unreasonably endangered by a building being moved through the highway, the owners are warranted in employing sufficient force to protect them from actual or impending destruction.⁶ The abatement must not cause a breach of the peace, and hence if it is resisted, the party must desist and resort to the

¹ *Arundel v. McCulloch*, 10 Mass. 71; *Rung v. Shoneberger*, 2 Watts, 23; 25 Am. Dec. 95; *Lincoln v. Chadbourne*, 56 Me. 197; *State v. Parrott*, 71 N. C. 311; 17 Am. Rep. 5; *Wetmore v. Tracy*, 14 Wend. 250; 28 Am. Rep. 525; *Hubbard v. Deming*, 21 Conn. 356; *Burnham v. Hotchkiss*, 14 Conn. 311; *Oliver v. Lofton*, 4 Ala. 240. One who has occasion to leave a load in the highway must remove it with promptness. If he lets it remain there an unreasonable time, it may be removed as a nuisance: *Northrop v. Burrows*, 10

Abb. Pr. 365. A gate erected on a highway pursuant to an act is a public nuisance after the act expires, and may be abated by any one: *Adams v. Beach*, 6 Hill, 271.

² *Howard v. Robbins*, 1 Lans. 63; *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 537.

³ *Goldsmith v. Jones*, 43 How. Pr. 415; *Clark v. Lake St. Clair Ice Co.*, 24 Mich. 508.

⁴ *Hopkins v. Crombie*, 4 N. H. 520.

⁵ *Drake v. Rogers*, 3 Hill, 604.

⁶ *Graves v. Shattuck*, 25 N. H. 257; 69 Am. Dec. 537.

courts.¹ And as a rule, the party permitting the nuisance must be first notified of its existence, and given a reasonable time to remove it himself.² But in cases of necessity, this notice is not requisite;³ and the party abating the nuisance must do so with as little injury as possible.⁴ In removing it, he is liable to the owner for a wanton or unnecessary injury.⁵

Where a nuisance consists in the use to which a building is put, and not in its location, the abatement cannot go beyond putting a stop to that use.⁶ Thus a manufac-

el C. Waak
¹ *Baldwin v. Smith*, 82 Ill. 162; *Miller v. Burch*, 32 Tex. 208; 5 Am. Rep. 242; *Day v. Day*, 4 Md. 262; *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536; *Perry v. Fitzhowe*, 8 Q. B. 757.

² *Jones v. Jones*, 1 Hurl. & C. 1; *Perry v. Fitzhowe*, 8 Q. B. 757; *Meeker v. Van Rensselaer*, 15 Wend. 397; *State v. Parrott*, 71 N. C. 311; 17 Am. Rep. 5; *Slight v. Gutzlaff*, 35 Wis. 675; 17 Am. Rep. 476; *Pierson v. Green*, 3 N. J. L. 497; 25 Am. Dec. 497.

³ *Van Wormer v. Alban*, 15 Wend. 262; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Lonsdale v. Nelson*, 2 Barn. & C. 302; the court saying: "Nuisances from commission are committed in defiance of those whom such nuisances injure; and the injured party may abate them without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person, on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other

cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."

⁴ *Greenslade v. Halliday*, 6 Bing. 379; *Indianapolis v. Miller*, 27 Ind. 394; *State v. Moffett*, 1 G. Greene, 247; *Moffett v. Brewer*, 1 G. Greene, 348; *Hicks v. Dom*, 42 N. Y. 47; 9 Abb. Pr., N. S., 47; *Roberts v. Rose*, L. R. 1 Ex. 82; the court saying: "Where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself, as against the wrong-doer, so far as his interference is positively necessary. We are also agreed that in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think if, by one of these alternative methods, some wrong would be done to an innocent third party, or to the public, then that method cannot be justified at all, although an interference with the wrong-doer himself might be justified. Therefore, where the alternative method involves such an interference, it must not be adopted, and it may become necessary to abate the nuisance in a manner more onerous to the wrong-doer."

⁵ *Indianapolis v. Miller*, 27 Ind. 394; *Northrop v. Burrows*, 10 Abb. Pr. 365.

⁶ *Brightman v. Bristol*, 65 Me. 426; 20 Am. Rep. 711; *Gray v. Ayres*, 7 Dana, 375; 32 Am. Dec. 107; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Barclay v. Com.*, 25 Pa. St. 503; 64 Am. Dec. 715; *Ely v. Supervisors*, 36 N. Y.

tory of offensive-smelling oil cannot be pulled down to abate the nuisance,¹ nor can a building which is a bawdy-

297; *Finley v. Hershey*, 41 Iowa, 387; *Miller v. Burch*, 32 Tex. 208; 5 Am. Rep. 242. In *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711, the court say: "In *Rex v. Papineau*, 1 Strange, 688, the defendant was indicted for a nuisance by reason of his tannery, and fined £100. A writ of error was brought, and one of the reasons given for its reversal was, 'that the judgment was erroneous for want of an adjudication that the nuisance be abated.' 'But,' said Lord Raymond, 'regularly, the judgment ought to be, to abate so much of the thing as makes it a nuisance. . . . If a dye-house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on.' In the same case, Reynolds, J., says: 'Roasting of coffee was formerly thought a nuisance, and yet nobody ever imagined the house in which it was roasted should be pulled down.' Then, referring to the tannery, he adds: 'I should think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abuse of it in dipping some skins.'" See also *Barclay v. Commonwealth*, 25 Pa. St. 503; 64 Am. Dec. 715. In *Welsh v. Stowell*, 2 Doug. (Mich.) 332, an action of trespass was brought for the destruction of a house of ill-fame by the city marshal of Detroit, acting in pursuance of a city ordinance authorizing him to proceed with sufficient force and demolish the same. "It is said," said Whipple, J., in delivering the opinion of the court, "that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill-fame. That which constitutes or causes the nuisance may be removed. Thus if a house is used for the purposes of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business. So a house in which gaming is carried on, to

the injury of the public morals, the individuals by whom it is occupied may be punished by indictment, and the implements of gaming removed; and a house in which indecent pictures are exhibited is a nuisance which may be abated by a removal of the pictures. Yet in this and the other cases stated it will not be contended that a person would be justified in demolishing the house, for the obvious reason that, to suppress the nuisance, such an act was unnecessary. So in the case before us, the nuisance was not caused by the erection itself, but by the persons who resorted there for the purposes of prostitution." In *Moody v. Supervisors of Niagara County*, 46 Barb. 659, an action was brought for the destruction of a bawdy-house which was likewise the resort of thieves, robbers, and murderers, and it appeared that, immediately before its destruction, one of the police was murdered by the people congregated there. It was held that the fact that the house is kept as a house of public prostitution renders it a common nuisance, but that a house cannot be lawfully destroyed by a mob because, for the time being, it is devoted to a purpose which the law characterizes as a common public nuisance; when it is the unlawful use of a building that constitutes a nuisance, the remedy is to stop such use, and not to tear down the building. In *Murray v. Ayres*, 7 Dana, 375, 32 Am. Dec. 107, the court expressed a like opinion. In *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297, a similar case of the destruction of a house of ill-fame came before the court. "The property of the plaintiff was not beyond the pale of the law's protection," said the court, "by her detestable and criminal conduct. She still had the right to expect and rely implicitly upon the zeal and ability of the proper officers to defend her house and furniture against the unlawful efforts of any public indignation her evil practices might provoke." The same views are fully sustained in Massachusetts by the opinion

¹ *Brightman v. Bristol*, 65 Me. 426; 20 Am. Rep. 711.

house;¹ for in both cases it is the use of the buildings, and not the buildings themselves, which constitute the nuisance. But where a dwelling-house had been cut up into small apartments and was inhabited by a crowd of filthy people, it was held that it might be abated by pulling it down, Asiatic cholera prevailing at the time, and that being the only way to correct the evil.² The mayor of a city, by virtue of his office, may demolish a wooden dwelling-house in a city which, by reason of the combustible nature of its materials and the disorderly char-

of Shaw, C. J., in *Brown v. Perkins*, 12 Gray, 89, and in Rhode Island, by that of Ames, C. J., in *State v. Paul*, 5 R. I. 185. In *Underhill v. Manchester*, 44 N. H. 214, a suit was brought by a saloon-keeper against the defendant town for damages caused by the destruction of plaintiff's property by a mob. The court held that he could not recover, because his business led to drunkenness and disorder; and by the provisions of the act making cities and towns liable for damages caused by mobs or riots, it was provided that no persons were entitled to recover, the destruction of whose property was caused by their illegal or improper conduct. Its decision is placed entirely upon the peculiar language of the statute. Doe, J., in his opinion, however, says that "the rioters are liable to the plaintiff for the damage done by them. His property, though solely used in violation of law, could not be lawfully destroyed, except under process of law: *Brown v. Perkins*, 12 Gray, 89; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310." In *Spalding v. Preston*, 21 Vt. 9, an action of trover was brought for counterfeit coins partly finished, against the sheriff by whom they had been seized under process, and detained to be used as evidence upon the trial of an indictment against the person in whose possession they were found, and likewise to prevent their being put in circulation; but the court held that the action was not maintainable. "Such property," remarks Redfield, J., "so to speak, is outlawed, and is common plunder." Counterfeit money is *per*

se unlawful, but porgee oil is an article of commerce, and its manufacture an honest and lucrative industry. In *Meeker v. Van Rensselaer*, 15 Wend. 397, the destruction, by individuals, of a dwelling-house during the prevalence of the Asiatic cholera, which was cut up into small apartments, inhabited by poor people in a filthy condition, and calculated to breed disease, was sanctioned, on the ground that it was a nuisance, and "that there was no other way to correct the evil but by pulling down the building." But this case has been doubted in *Welch v. Stowell*, 2 Mich. 332; and in a subsequent case in New York the court say that it can only be sustained upon the ground that in no other way could the safety of the people be preserved. In *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, a suit was brought for the value of liquors kept for sale in violation of the statutes of the state; and it was held not maintainable, among other reasons, because by statute the *status* of the liquors was illegal. Not so in this case. The plaintiff was engaged in a lawful business. If the place of his manufacturing was improper, that was to be determined by a jury, not by a mob of men in disguise.

¹ *Ely v. Supervisors*, 36 N. Y. 297; *Gray v. Ayres*, 7 Dana, 375; 32 Am. Dec. 107; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Barclay v. Commonwealth*, 25 Pa. St. 503; 64 Am. Dec. 715.

² *Meeker v. Van Rensselaer*, 15 Wend. 397; *Van Wormer v. Albany*, 15 Wend. 262.

acter of its occupants, endangers the lives, health, and property of the neighboring residents.¹ The legislature may authorize the abatement by destruction of unhealthy houses.² The assent of a party to a nuisance will not take away his right afterwards to abate it, if he thinks proper.³

ILLUSTRATIONS.—Plaintiff had erected an oyster-house in a tidal river opposite the defendant's villa lots. Defendant tore it down before it was used, on the ground that it obscured the prospect, obstructed the access, and injured the value of the lots. *Held*, that the act of defendant was unjustifiable: *Bowden v. Lewis*, 13 R. I. 189; 43 Am. Rep. 21. The owners of a steamboat licensed to run on a navigable river notified the owners of a railroad bridge crossing the river to make a draw in their bridge as required by their charter; some months after, the owners of the boat arriving with their boat at the bridge, and being unable to pass it, no draw having been made, tore down part of it and passed. *Held*, a lawful abatement of a nuisance: *State v. Parrott*, 71 N. C. 311; 17 Am. Rep. 5. The plaintiffs, while occupying the store adjoining that of defendants, caused to be erected, without any permission, in front of defendants' store, a triangular box, seven feet high, and projecting about two feet and a half from the curb upon the sidewalk, around a telegraph-pole, and caused their names and business to be printed upon it, using it as a sign, and the defendants ordered the plaintiffs to remove the box, and threatened to remove it themselves and to obliterate the sign, and upon the plaintiffs refusing, the defendants caused the names and sign on the box to be daubed with paint so as to obliterate them. *Held*, that the defendants were liable to an action for malicious trespass: *Goldsmith v. Jones*, 43 How. Pr. 415. Plaintiff, who owned the land on both sides of the highway where a stream of water crossed it, erected obstructions so that the stream could not be reached, but not interfering with travel on the highway. *Held*, that such obstructions were not a nuisance, public or private, and that defendant, who had watered his cattle at that place for over twenty years had, from such use, no right to continue to do so, and was guilty of trespass in tearing the obstructions down: *Strickland v. Woolworth*, 3 Thomp. & C. 286. A merchant owning a store fifty feet from a railroad track in the same street, in unloading a car of flour by skids three feet high extending from car to store, refused to let the defendant's team repass, whereupon the defendant

¹ *Fields v. Stokley*, 99 Pa. St. 306; 44 Am. Rep. 109.

² *Theilan v. Porter*, 14 Lea, 622; 52 Am. Rep. 173.

³ *Pilcher v. Hart*, 1 Humph. 524.

knocked down a wooden horse supporting the skids. The side of this street beyond the car was unobstructed. *Held*, that the defendant was liable in trespass: *Mathews v. Kelsey*, 58 Me. 56; 4 Am. Rep. 248. A. placed a seine-reel on the land of G. near to a river, and G. gave him reasonable notice to remove it, and on his neglect to remove it, cut it down, and shoved it towards the river, and it floated off. *Held*, that G.'s acts were justifiable, and not a trespass upon A.: *Almy v. Grinnell*, 12 Met. 53; 45 Am. Dec. 238. The raft of A. had caught on a dam, and B.'s raft had been cast by the obstruction of A.'s raft onto the bank, and a third raft had caught upon B.'s, and there was danger that the rafts would be broken. *Held*, that B. had a right, after the lapse of time enough for A. to remove his raft, to cast away enough of A.'s raft to remove the obstruction: *Philiber v. Matson*, 14 Pa. St. 306.

§ 1034. **By Self-defense.** — A person may prevent an injury threatened by exercising his right of self-defense. Every one has a right to defend his own person, and the persons of those standing in the relation of husband or wife, or parent or child, or master and servant, and his own property from attack.¹ Preventing a wrong-doer from committing an unlawful act does not constitute a cause of action for damages in his favor.²

§ 1035. **By Recaption or Reprisal.** — Recaption or reprisal is a remedy by the act of the party himself, where any of his personal property, or any person to whose custody he is entitled, is taken or detained away from him. This consists in retaking the same into his own possession whenever or wherever he may peaceably do so.³ He must not, however, in so doing, break the peace.⁴ Yet if he breaks the peace, the entry is not a trespass, but he is liable to prosecution.⁵ The owner of a horse which

¹ *Scribner v. Beach*, 4 Denio, 448; 47 Am. Dec. 265.

² *Bangor etc. R. R. Co. v. Smith*, 49 Me. 9; 77 Am. Dec. 246.

³ *Cooley on Torts*, 50; *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *Bobb v. Bosworth*, Litt. Sel. Cas. 41; 12 Am. Rep. 273; *Chambers v.*

Bedell, 2 Watts & S. 225; 37 Am. Rep. 508; *Scribner v. Beach*, 4 Denio, 448; 47 Am. Dec. 265.

⁴ 3 Bla. Com. 4.

⁵ *Brown v. Cram*, 1 N. H. 171; *Blades v. Briggs*, 10 Com. B., N. S., 713; *Mills v. Wooters*, 59 Ill. 234.

another's servant has harnessed in his team and is driving violently away may stop the team, using no more force than necessary, and retake his horse.¹ The owner of real estate is entitled to exclusive possession thereof, and every unauthorized entry thereon is a trespass; but if one take the goods of another, and carry them upon his own land, the owner may enter to retake them, because the wrong of the other excuses the entry.² So if one, though not purposely a wrong-doer himself, has received goods from another whose possession was tortious, the owner may enter to retake them.³ If one's property is on the land of another with the latter's assent, express or implied, the owner may enter to remove it,⁴ provided he gives notice of his intention and enters at a reasonable time.⁵

If one sells goods which are in his own possession, and nothing in the contract of sale indicates that they are to be delivered elsewhere than where they are, the sale itself is an implied license to the purchaser to enter and take the goods away; and this license, being coupled with an interest, is incapable of being revoked.⁶ So where one,

¹ *Hite v. Long*, 6 Rand. 457; 18 Am. Dec. 720.

² *Cooley on Torts*, 50; *Chapman v. Thumblethorp*, Cro. Eliz. 329; *Patrick v. Colerick*, 3 Mees. & W. 483; *Webb v. Beavan*, 6 Man. & G. 1055; *Richardson v. Anthony*, 12 Vt. 273; *White v. Twitchell*, 25 Vt. 620; 60 Am. Dec. 294; *Spencer v. McGowen*, 13 Wend. 256; *Newkirk v. Sabler*, 9 Barb. 652; *Burns v. Johnson*, 1 J. J. Marsh. 196; *State v. Elliott*, 11 N. H. 540; *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *Allen v. Feland*, 10 B. Mon. 306; *Chambers v. Bedell*, 2 Watts & S. 225; 37 Am. Dec. 508; *Scribner v. Beach*, 4 Denio, 448; 47 Am. Dec. 265.

³ *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795. See *McLeod v. Jones*, 105 Mass. 403; 7 Am. Rep. 539.

⁴ *Richardson v. Anthony*, 12 Vt. 273; *Daniels v. Brown*, 34 N. H. 456; 69 Am. Dec. 505; *Nettleton v. Sykes*,

8 Met. 34; *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *White v. Elwell*, 48 Me. 360; 77 Am. Dec. 231; *Chambers v. Bedell*, 2 Watts & S. 225; 37 Am. Dec. 508; *Anthony v. Haney*, 8 Bing. 187.

⁵ *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *Blades v. Briggs*, 10 Com. B., N. S., 713. But if the owner of the property was himself a wrong-doer in leaving it on the land, he has no right to enter to recover it: *Anthony v. Haney*, 8 Bing. 187; *Chess v. Kelley*, 3 Blackf. 438; *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Johnson*, 14 Johns. 406; *Crocker v. Carson*, 33 Me. 436; *Roach v. Dameron*, 2 Humph. 425.

⁶ *Cooley on Torts*, 51; *Wood v. Manley*, 11 Ad. & E. 34; *Giles v. Simonds*, 15 Gray, 441; 77 Am. Dec. 373; *Nettleton v. Sikes*, 8 Met. 34; *McLeod v. Jones*, 105 Mass. 403; 7 Am. Rep. 539. "A license is im-

upon his own land, has been rightfully in possession of property, but his right has terminated and been acquired by another, the latter may lawfully enter to take it away.¹ So where property has been obtained by fraud, and the vendor rescinds the sale.² Where property exempt from execution is taken, the debtor may recover possession of it peaceably, but not forcibly; and after he has recovered it peaceably, it will be trespass in the officer to retake it, and assault and battery to retake it with force.³

ILLUSTRATIONS.—The plaintiff took a bar or pole from the defendant without permission to do so, to use in the erection of a staging, and the defendant retook the same without notice to the plaintiff; and in consequence of taking the same, the said staging, when the plaintiff went upon the same, fell and injured the plaintiff. Plaintiff brought an action to recover damages for the injury thus sustained. *Held*, that as the plaintiff was a trespasser in taking the bar, and as it did not lose its identity, the defendant was justified in the recaption of it, and was under no obligation to give the plaintiff notice of the recaption: *White v. Twitchell*, 25 Vt. 620; 60 Am. Dec. 294. M. owned and had a right to the possession of personal property which was on the premises of H., and was forbidden by the latter to enter for the purpose of removing it, but persisted and commenced taking down the fence in order to make such removal. *Held*, that M. was liable for trespass: *Huppert v. Morrison*, 27 Wis. 365. In an action of trespass for the forcible taking of a cow, it appeared

plied," says Wells, J., in this case, "because it is necessary to carry the sale into complete effect, and is therefore presumed to have been in the contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance. But there is no such inference to be drawn when the property, at the time of the sale, is not upon the seller's premises, or when, by the terms of the contract, it is to be delivered elsewhere. And

when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them respecting it, except what results from the facts of legal ownership in one and possession in the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone: 20 Vin. Abr. 508, tit. Trespass, H, a, 2 pl. 18; *Anthony v. Haney*, 8 Bing. 186; *Williams v. Morris*, 8 Mees. & W. 488."

¹ *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; 52 N. H. 197.

² *Wheelden v. Lowell*, 50 Me. 499; *Hodgeden v. Hubbard*, 18 Vt. 504; 46 Am. Dec. 167.

³ *Sims v. Reed*, 12 B. Mon. 51.

that plaintiff had sold the cow, and defendant purchased her from his vendee; and at the time of taking she was in possession of a third party, and plaintiff told defendant he had sold her, and that he might take her. *Held*, there was no trespass, although defendant, in taking his property, used such violence as amounted to a breach of the peace: *Mills v. Wooters*, 59 Ill. 234.

§ 1036. **Entry on Lands to Repossess Them.** — Where another is in wrongful possession of them, the owner of lands has a right to re-enter and eject the intruder. This right exists either when one has gone into possession without right, or where one, having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law, or by the act of the owner.¹ But the entry must be peaceful.²

§ 1037. **Distress of Cattle — Damage-feasant.** — If the cattle of one man stray upon the lands of another, thereby causing him damage, he may distrain and hold them until the damage is estimated and satisfied. This is a common-law right, and is regulated by statute.³ It exists only where the owner would be liable to an action.⁴

§ 1038. **By Distress of Goods.** — An extraordinary remedy was allowed a landlord by the common law which permitted him to seize for his rent all movable articles, with a few exceptions, on the premises, and whether belonging to the tenant or not. This remedy in the United States is now either entirely obsolete or regulated by statute.⁵

§ 1039. **Remedy by Action.** — This remedy is the most frequent, and is the subject of the remainder of this title.

¹ Cooley on Torts, 58; Taunton v. Costar, 7 Term Rep. 431; Turner v. Meymott, 1 Bing. 158; Argent v. Durrant, 8 Term Rep. 403; Barnes v. Dean, 5 Watts, 543; 30 Am. Dec. 346; Thompson v. Craigmyle, 4 B. Mon. 391; 41 Am. Dec. 240; Sharon v. Wooldrick, 18 Minn. 355.

² Cooley on Torts, 58.

³ Cooley on Torts, 58. See *post*, Division III, Title Animals.

⁴ Dickson v. Parker, 3 How. (Miss.) 219; 34 Am. Dec. 78.

⁵ See *post*, Division III., Title Landlord and Tenant.

"The redress the law will give will be suited to the injury suffered. If one's land is taken from him, he shall have the proper writ for its recovery. If personal property is taken which he prefers to recover rather than have judgment for its money value, he may demand back the thing itself. But the principal remedy, and for the most part the only available remedy which the law can give for a wrong, is an award of money estimated as an equivalent for the damage suffered."¹

§ 1040. Who are Responsible — Infants — Married Women — Corporation — Lunatics. — It is no defense to an action of tort that the wrong-doer is an infant;² or with certain exceptions, a married woman;³ or a corporation.⁴ In general, a lunatic is liable civilly for any torts which he may commit.⁵ A lunatic has been held responsible for tortiously killing an animal bailed;⁶ for false imprisonment.⁷ But a lunatic is not responsible where the intent is the *gravamen* of the charge; as in slander.⁸ Intoxication is no defense, even in an action of slander.⁹

§ 1041. Joint Wrong-doers — Participation — Ratification. — A person may become a wrong-doer, and be responsible for the damage done, either by participation or by adoption.¹⁰ If one agree to a trespass which has been committed by another for his benefit, trespass will lie

¹ Cooley on Torts, 60.

² See *ante*, Division I., Parent and Child.

³ See *ante*, Division I., Husband and Wife.

⁴ See *ante*, Division I., Corporations.

⁵ *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349; *Cross v. Kent*, 32 Md. 581; *Behrens v. McKenzie*, 23 Iowa, 333; 92 Am. Dec. 428; *Bush v. Pettibone*, 4 N. Y. 300; *Lancaster Bank v. Moore*, 78 Pa. St. 407; 21 Am. Rep. 24; *Ex parte Leighton*, 14 Mass. 207.

⁶ *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349.

⁷ *Krom v. Schoonmaker*, 3 Barb. 650.

⁸ *Gates v. Meredith*, 7 Ind. 440; *Horner v. Marshall*, 5 Munf. 466; *Dickenson v. Barker*, 9 Mass. 225; 6 Am. Dec. 58; *Yeates v. Reed*, 4 Blackf. 463; *Bryant v. Jackson*, 6 Humph. 199.

⁹ *Reed v. Harper*, 25 Iowa, 87; 95 Am. Dec. 774; *McKee v. Ingalls*, 5 Ill. 30.

¹⁰ All persons who aid, abet, counsel, or procure an assault, etc., to be committed are principals, whether present or absent at the commission: *Avery v. Bulkly*, 1 Root, 275; *Sikes v. Johnson*, 16 Mass. 389.

against him, although the act was not done in obedience to his command or at his request.¹ Trespass lies against one who carries away the materials of a building, although he did not assist in the pulling down.² One who is present at and encourages the commission of an assault and battery may be held liable as a principal, although he does not take any actual part in the violence.³ A person to be liable as a joint trespasser in an assault and battery, where he was not present at the commission of the offense, must be proven to have done something which led directly to the commission of the offense by his co-trespasser.⁴ A person who goes to a place with others with the intent to get up a fight with persons there may be liable for an assault and battery committed in the execution of that purpose, although he did not participate in such assault.⁵ A person does not participate in a wrong by merely approving the act of another, or by not preventing it when within his power, or even by expressing satisfaction at its commission.⁶ One who is present at the commission of an assault and battery, without in any way encouraging or discouraging it, is not liable in damages therefor to the person assaulted. Nor is it material that he is a selectman of the town in which the assault and battery were committed, and that he participated in a public meeting, held a short time before, at which a committee was appointed to visit those suspected of being disloyal, in pursuance of which the plaintiff was visited by the committee, followed by a large crowd of persons, by some of whom he was assaulted in the presence of the defendant, if no violence was suggested or contemplated at the meeting.⁷ Where persons fail, when it is in their

Caldwell v. Sacra, Litt. Sel. Cas. 118; 12 Am. Dec. 285.

² Woodruff v. Halsey, 8 Pick. 333; 19 Am. Dec. 329.

³ Little v. Tingle, 26 Ind. 168; Frantz v. Lenhart, 56 Pa. St. 365; United States v. Ricketts, 1 Cranch

C. C. 164; Corney v. Burks, 11 Neb. 258.

⁴ Bird v. Lynn, 10 B. Mon. 422.

⁵ Rheinart v. Whitehead, 64 Wis.

⁶ Blue v. Christ, 4 Ill. App. 351.

⁷ Miller v. Shaw, 4 Allen, 500.

power, to prevent a merciless battery upon a feeble old man, other slight circumstances may convict them all as principals in the trespass, though they did prevent his being murdered.¹ In an action of trespass against two or more acting independently, and producing a result injurious to the plaintiff, one cannot be held for the acts of the others.² To become a wrong-doer by adoption or ratification, it is essential that the original act was done in his interest, or was intended to further his purpose.³ The ratification must also be made with full knowledge of the facts.⁴ It is not conclusive evidence of adoption that the party receives and appropriates a benefit from what is done,⁵ or that he employs counsel to defend the trespasser,⁶ or that he takes steps in the direction of a compromise.⁷

ILLUSTRATIONS. — A sees B defrauding C, and fails to put him on his guard. A does not participate in the fraud so as to be liable for it: *Brannock v. Bouldin*, 4 Ired. 61. B, knowing that C, the driver of a team, had hired it to go to one place only, rides with him to another. B does not thereby become a trespasser with C: *Hubbard v. Hunt*, 41 Vt. 376. A allowed B to use his horse and wagon and barn for getting in and thrashing grain, the title to which was in dispute between C and B. *Held*, that this did not implicate A as a trespasser: *Heitzman v. Divil*, 11 Pa. St. 264. A boy ten years old was forcibly put on board of a freight train by its brakeman, and against his will was carried five miles. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. *Held*, that the brakeman was

¹ *Gillon v. Wilson*, 3 T. B. Mon. 217.

² *Blaisdell v. Stephens*, 14 Nev. 17; 33 Am. Rep. 523.

³ *Cooley on Torts*, 127; citing *Wilson v. Tummam*, 6 Man. & G. 236; *Knight v. Nelson*, 117 Mass. 458; *Murray v. Lovejoy*, 2 Cliff. 191; 3 Wall. 1; *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; *Hull v. Pickersgill*, 1 Ball & B. 282; *Harrison v. Mitchell*, 13 La. Ann. 260; *Collins v. Waggoner*, Breese, 26; *Beveridge v. Rawson*, 51 Ill. 504; *Allred v. Bray*, 41 Mo. 484; 97 Am. Dec. 283; *Grund v. Van Vleck*, 69 Ill. 479; *Vanderbilt*

v. Turnpike Co., 2 N. Y. 479; 51 Am. Dec. 315; *Brainerd v. Dunning*, 30 N. Y. 211; *Wiggins v. United States*, 3 Ct. Claims, 412. See *Buron v. Denman*, 2 Exch. 167.

⁴ See Division I., Agency—Ratification, *ante*.

⁵ *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Read*, 13 Mees. & W. 834.

⁶ *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; *Woolen v. Wright*, 1 Hurl. & C. 554.

⁷ *Roe v. R. R. Co.*, 7 Exch. 36; 7 Eng. L. & Eq. 546.

liable in trespass, and that the conductor of the train, present and directing or consenting to the acts of the brakeman, was also liable: *Drake v. Kiely*, 93 Pa. St. 492. The owner of a lot caused the erection of a building thereon. He furnished the material; A was architect and superintendent, and buyer of the material as the owner's agent, and B was the mason and builder. The materials were so inferior, and the construction so poor, that the wall fell, injuring the house of an adjoining lot-owner. *Held*, that all three were liable for the damage: *Jarvis v. Baxter*, 52 N. Y. Sup. Ct. 109. Three persons at midnight demanded admittance to a restaurant which was closed for the night, but had a light burning within. One of them went around to a side door, entered, and told the keeper that one of the others wanted to come in. The others being at the front door, one said to the other, "Fire a salute." The one addressed fired a pistol, and the ball went through the door, and severely wounded the keeper. There was an ordinance prohibiting the discharge of fire-arms in the street. *Held*, that the person firing, and the one advising the firing, were responsible: *Daingerfield v. Thompson*, 33 Gratt. 136; 36 Am. Rep. 783. Several persons were engaged in playing a game of ball in the public highway, and a traveler lawfully passing thereon was accidentally struck by the ball. *Held*, that all the persons so engaged were liable in trespass, provided that, from the width of the road, and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was of such a character as to be likely to endanger the safety of travelers and passengers, and that the individual by whom the ball was thrown was acting in the usual manner of persons engaged in such game: *Vosburgh v. Moak*, 1 Cush. 453; 48 Am. Dec. 613. A prisoner, under arrest upon a charge of larceny, was taken from his place of confinement to the outskirts of the town in the night-time, by those having the prisoner in charge, and one of the number, placing his hand upon the prisoner's shoulder, produced a rope, and required him to confess the larceny. *Held*, that such persons were all liable in damages: *Stallings v. Owens*, 51 Ill. 92.

§ 1042. **Liability of Plaintiff in Writ for Acts of Officers.** — A person placing legal process in the hands of the proper officer for service is not liable for the officer's act in following the command of the writ, provided it is properly issued and by the proper authority;¹ nor for the

¹ Cooley on Torts, 129. As to liability of attorneys in such cases, see *ante*, Division I., title Principal and Agent—Attorney and Client.

act of the officer in going beyond the authority given by the writ is the party responsible, unless he advised and assisted the officer in such act.¹ But the party is responsible where the officer has departed from the command of his writ, or from his instructions, if he has afterwards approved what was done, and has taken, or is seeking to take, a benefit from it.² But where the plaintiff receives only such benefits as he would have been entitled to under a lawful service of the writ, he cannot, from this fact alone, be held to be a participant in the officer's trespasses.³ Trespass lies against a plaintiff who

¹ *Averill v. Williams*, 4 Denio, 295; 47 Am. Dec. 252; *Hyde v. Cooper*, 26 Vt. 552; *Taylor v. Trask*, 7 Cow. 249; *Chapman v. Douglass*, 5 Daly, 244; *Abbott v. Kimball*, 19 Vt. 551; 47 Am. Dec. 708; *Wilson v. Tummam*, 6 Man. & G. 244; *Princeton Bank v. Gibson*, 20 N. J. L. 138; *Berry v. Kelly*, 4 Rob. (N. Y.) 106.

² *Cooley on Torts*, 130; citing *Tompkins v. Haile*, 3 Wend. 406; *Root v. Chandler*, 10 Wend. 111; 25 Am. Dec. 546; *Allen v. Crary*, 10 Wend. 349; 25 Am. Dec. 566; *Davis v. Newkirk*, 5 Denio, 94; *Ball v. Loomis*, 29 N. Y. 412; *Leach v. Francis*, 41 Vt. 670; *Stroud v. Humble*, 2 La. Ann. 930; *Bonnel v. Dunn*, 28 N. J. L. 153; *Knight v. Nelson*, 117 Mass. 458; *Wetzell v. Waters*, 18 Mo. 396; *Nelson v. Cook*, 17 Ill. 443; *Syndacker v. Brosse*, 51 Ill. 357; *Beveridge v. Rawson*, 51 Ill. 504; *Deal v. Bogue*, 20 Pa. St. 228; 57 Am. Dec. 702.

³ *Lewis v. Reed*, 13 Mees. & W. 834; *Hyde v. Cooper*, 26 Vt. 552. In this case an officer had proceeded to sell property on execution without sufficient notice. The plaintiff in the execution was sued in trespass as a participant in the wrong. It appeared that before the sale he had expressed the opinion that the notice was sufficient, and also that he received the money on execution. Said *Redfield, C. J.*: "As a general rule, perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party, knowing all the facts, consents to take the avails of a sale, or where he counseled the very act

which creates the liability of the officer, he is implicated to the same extent as the officer. But when the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable unless he consents to the officer's course, or subsequently adopts it. And if he does that, he cannot maintain an action against the officer for doing the act, and the consequence would be, that if receiving the avails of a sale on execution were to be regarded in all cases as amounting to a ratification of the conduct of the officer in the sale, it must preclude the creditor from all suits against the officer on that account; which has never been so regarded. The party may always take money which the officer informs him he has legally collected, without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter. For if the officer is compelled to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money against the officer. And the party cannot claim the money of the creditor without thereby affirming the

directs an officer to detain property, and indemnifies him.¹ A plaintiff directing, and a constable making, a levy and sale, against the consent of the defendant, of corn exempt from execution, are trespassers, whether they forcibly took and carried away the corn or not.² Where execution on a void judgment has been levied by the sheriff by direction of the judgment creditors, they are all joint trespassers and liable for the property seized.³

§ 1043. Liability of Officer for Acts of Deputies.—

Where an officer is authorized by law to appoint a deputy, he is liable for his acts done under color of his appointment.⁴ A sheriff, for example, is liable to the plaintiff in the writ for his deputy's misconduct or neglect which injures him.⁵ So he is also liable for the deputy's misfeasances and non-feasances which injure the defendant,⁶ or any third person.⁷ The fact that the sheriff is responsible does not relieve the deputy, who is equally liable with the sheriff for all his positive misfeasances;⁸ but when a mere neglect to perform an official duty is com-

sale. So that the creditor's accepting the amount of money for which the property is sold is no more a ratification of the conduct of the officer than if he took the money of the officer on any other liability. The money is the officer's, whether he was a trespasser or not, and he is, at all events, liable to the creditor. If the sale was irregular, that is his loss, and he must still pay the creditor; and accepting the money is but taking pay for the officer's liability to the creditor for his default in the sale if it was irregular. So that in any view of the case there is no ground for implicating the defendant."

¹ *Root v. Chandler*, 10 Wend. 110; 25 Am. Dec. 546; *Lovejoy v. Murray*, 3 Wall. 1; *Murray v. Ezell*, 3 Ala. 148; *Herring v. Hoppock*, 15 N. Y. 409; *Pozzoni v. Henderson*, 2 E. D. Smith, 146.

² *Atkinson v. Gatcher*, 23 Ark. 101.

³ *Shaw v. Rowland*, 32 Kan. 154.

⁴ *Cooley on Torts*, 132.

⁵ *Blunt v. Sheppard*, 1 Mo. 219; *Marshall v. Hosmer*, 4 Mass. 60; *Esty v. Chandler*, 7 Mass. 464; *McIntyre v. Trumbull*, 7 Johns. 35; *Curtis v. Fay*, 37 Barb. 64; *Pond v. Leman*, 45 Barb. 152; *Mason v. Ide*, 30 Vt. 697; *Seaver v. Pierce*, 42 Vt. 325; *Stimpson v. Pierce*, 42 Vt. 334; *Whitney v. Farrar*, 51 Me. 418; *Remlinger v. Weyker*, 22 Wis. 383; *Clute v. Goodell*, 2 McLean, 193.

⁶ *Woodgate v. Knatchbull*, 2 Term Rep. 148; *Grunnell v. Phillips*, 1 Mass. 529; *Knowlton v. Bartlett*, 1 Pick. 270; *Waterbury v. Westervelt*, 9 N. Y. 598; *King v. Orser*, 4 Duer, 431.

⁷ *Ackworth v. Kempe*, Doug. 41; *Campbell v. Phelps*, 17 Mass. 244; *Norton v. Nye*, 56 Me. 211. But see *Harrington v. Ward*, 9 Mass. 251.

⁸ *Purrinton v. Loring*, 7 Mass. 388; *Ross v. Philbrick*, 39 Me. 29; *Remlinger v. Weyker*, 22 Wis. 383.

plained of, only the sheriff can be sued, because only upon him does the official duty rest.¹

§ 1044. **Intentional Wrong-doers — Liable Jointly and Severally.**— Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, they are all jointly liable therefor.² And the party injured is at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy, regardless of the participation of the others.³ He may even bring different forms of action against the different participants in the wrong; as trespass against one, trover against another, and so on.⁴ In trespass by A against B and C, A, on making a case for exemplary damages against B, and not against C, may dismiss as to C and recover against B.⁵ Where an action is for joint

¹ *Cameron v. Reynolds*, Cowp. 403; *Hutchinson v. Parkhurst*, 1 Aik. 258; *Buck v. Ashley*, 37 Vt. 475; *Armistead v. Marks*, 1 Wash. (Va.) 325; *Rose v. Lane*, 3 Humph. 218; *Paddock v. Cameron*, 8 Cow. 212. But see *Draper v. Arnold*, 12 Mass. 449; *Tuttle v. Love*, 7 Johns. 470; *Abbott v. Kimball*, 19 Vt. 551; 23 Am. Dec. 222.

² *Cooley on Torts*, 133; *Miller v. Fenton*, 11 Paige, 18; *Knickerbacker v. Colver*, 8 Cow. 111; *Wheeler v. Worcester*, 10 Allen, 591; *Brown v. Perkins*, 1 Allen, 89; *Barden v. Felch*, 109 Mass. 154; *Nelson v. Cook*, 17 Ill. 443; *Johnson v. Barber*, 10 Ill. 425; 50 Am. Dec. 416; *Turner v. Hitchcock*, 20 Iowa, 310; *Woodbridge v. Connor*, 49 Me. 353; 77 Am. Dec. 263; *Page v. Freeman*, 19 Mo. 421; *Wright v. Lathrop*, 2 Ohio, 33; 15 Am. Dec. 529; *McGehee v. Shafer*, 15 Tex. 198; *Knott v. Cunningham*, 2 Sneed, 204; *McMannus v. Lee*, 43 Mo. 206; 97 Am. Dec. 386; *Lewis v. Johns*, 34 Cal. 629; *Shepherd v. McQuilkin*, 2 W. Va. 90.

³ *Cooley on Torts*, 134; *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v.*

Milner, 2 Camp. 452; *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hodgson*, 6 Term Rep. 405; *Merryweather v. Nixan*, 8 Term Rep. 186; *Vose v. Grant*, 15 Mass. 505; *Wheeler v. Worcester*, 10 Allen, 591; *Campbell v. Phelps*, 1 Pick. 62; 11 Am. Dec. 139; *Wilford v. Grant*, Kirby, 114; *Thweatt v. Jones*, 1 Rand. 323; 10 Am. Dec. 538; *Dupuy v. Johnson*, 1 Bibb, 562; *Acheson v. Miller*, 18 Ohio, 1; *Wallace v. Miller*, 15 La. Ann. 449; *Moore v. Appleton*, 26 Ala. 633; *Rhea v. White*, 3 Head, 121; *Murphy v. Wilson*, 44 Mo. 313; 100 Am. Dec. 290; *Silvers v. Nerdlinger*, 30 Ind. 53; *Bishop v. Ely*, 9 Johns. 294; *Williams v. Sheldon*, 10 Wond. 654; *Mayne v. Griswold*, 3 Sandf. 463; *Matthews v. Menedger*, 2 Mich. 145; *Guille v. Swan*, 19 Johns. 381; 10 Am. Dec. 234; *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330; *Floyd v. Browne*, 1 Rawle, 125; 18 Am. Dec. 602; *Hawkins v. Hatton*, 1 Nott & McC. 318; 9 Am. Dec. 700; *Bloss v. Plymale*, 3 W. Va. 393; 100 Am. Dec. 752; and see note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149.

⁴ *Du Bose v. Marx*, 52 Ala. 506.

⁵ *Pardridge v. Brady*, 7 Ill. App. 639.

trespass, one defendant may be convicted for acts done alone as well as for those done in concert with others.¹ A verdict in trespass against all the defendants jointly cannot be sustained on evidence which fails to implicate all.² In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them.³ After suit is brought, there can be no apportionment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blameableness as between himself and his associates is immaterial.⁴ When the contributory action of all accomplishes a particular result, it is unimportant to the party injured that one contributed much to the injury and another little; the one least guilty is liable for all, because he aided in accomplishing all.⁵ The judgment is for a single sum against all the parties proved guilty of the tort.⁶ Damages for separate trespass of one of two defendants cannot be included in a joint judgment against both.⁷ Bringing suit against one or more of the wrong-doers is no bar to a new suit against the others.⁸ Nor is a covenant not to sue.⁹ Nor is the obtaining of a judgment until satisfaction is made.¹⁰

¹ *Blanchard v. Burbank*, 16 Ill. App. 375.

² *Grusing v. Shannon*, 2 Ill. App. 325.

³ *Davis v. Franke*, 33 Gratt. 413.

⁴ *Cooley on Torts*, 135; *Bell v. Morrison*, 27 Miss. 68. In actions against several defendants for their joint trespass, damages may be severed and apportioned according to the degree and nature of the offense committed by each: *Smith v. Singleton*, 2 McMull. 184; 39 Am. Dec. 122.

⁵ *Cooley on Torts*, 135; *Berry v. Fletcher*, 1 Dill. 67; *Kirkwood v. Miller*, 5 Sneed, 455; 73 Am. Dec. 134.

⁶ *Cooley on Torts*, 136.

⁷ *Symonds v. Hall*, 37 Me. 354; 59 Am. Dec. 53.

⁸ *Cooley on Torts*, 136.

⁹ *Snow v. Chandler*, 10 N. H. 92; 34 Am. Dec. 140.

¹⁰ *Murray v. Lovejoy*, 2 Cliff. 191; 3 Wall. 1; *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330; *Elliott v. Porter*, 5 Dana, 299; *Sharp v. Gray*, 5 B. Mon. 4; *United Society v. Underwood*, 11 Bush, 265; 21 Am. Rep. 214; *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458; *Stone v. Dickinson*, 5 Allen, 29; 81 Am. Dec. 727; *Brown v. Cambridge*, 3 Allen, 474; *Griffie v. McClung*, 5 W. Va. 131; *Morgan v. Chester*, 4 Conn. 387; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Sheldon v. Kibbe*, 3 Conn. 214; 8 Am. Dec. 176; *Wright v. Lathrop*, 2 Ohio, 33; 15 Am. Dec. 529; *Sanderson v. Caldwell*, 2 Aik. 195; *Stewart v. Mar-*

In Massachusetts it has been held that judgment in replevin against one of two joint takers for a portion of chattels taken and nominal damages, under which all the property is recovered, some of it, however, in a damaged condition, is a bar to a subsequent action against both takers for further damages for the taking and detention.¹ And if some of the defendants should make default, and an interlocutory judgment be rendered against them, it is erroneous to render judgment against those who appear and contest the action, without embracing the defaulting defendants.² Accepting satisfaction from one is a bar as to all;³ and a release of one is a release of all;⁴ though the release stipulates that the others shall not be discharged.⁵ A partial payment made by a co-trespasser in satisfaction of the damages sustained by reason of the joint trespass inures to the benefit of the other, and in an action against the latter must be considered by the jury in determining the amount of their verdict.⁶ If plaintiff sues one joint wrong-doer for less than the amount which

tin, 16 Vt. 397; *Turner v. Hitchcock*, 20 Iowa, 310; *McGehee v. Shafer*, 15 Tex. 198; *Knott v. Cunningham*, 2 Sneed, 204; *Christian v. Hoover*, 6 Yerg. 505; *Smith v. Singleton*, 2 McMull. 184; 39 Am. Dec. 122; *Blann v. Crocheron*, 19 Ala. 647; 54 Am. Dec. 203; *Callard v. R. R. Co.*, 6 Fed. Rep. 246; *Du Bose v. Marx*, 52 Ala. 506; *Jones v. Lowell*, 35 Me. 541; *Page v. Freeman*, 19 Mo. 421; *Marsh v. Berry*, 7 Cow. 348; *Floyd v. Browne*, 1 Rawle, 125; 18 Am. Dec. 602; *Hawkins v. Hatton*, 1 Nott & McC. 318; 9 Am. Dec. 700. In England it is held that recovery of judgment against one wrong-doer is a bar to a suit against the others: *Brown v. Wootton*, Cro. Jac. 73; *Buckland v. Johnson*, 15 Com. B. 145; *King v. Hoare*, 13 Mees. & W. 494; *Brinsmead v. Harrison*, L. R. 6 Com. P. 584. And this rule has been followed in a few cases in this country: *Wilkes v. Jackson*, 2 Hen. & M. 355; *Hunt v. Bates*, 7 R. I. 217; 82 Am. Dec. 592. In some states taking out execution on one judgment

is a discharge of the other: *Allen v. Wheatly*, 50 Ind. 278; *Golding v. Hall*, 9 Port. 169; *Blann v. Crocheron*, 20 Ala. 320; *Boardman v. Acer*, 13 Mich. 77; 87 Am. Dec. 736; *Page v. Freeman*, 19 Mo. 421; *White v. Philbrick*, 5 Me. 147; 17 Am. Dec. 214; *Fleming v. McDonald*, 50 Ind. 278; 19 Am. Rep. 711.

¹ *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705.

² *Bivins v. McElroy*, 11 Ark. 23; 52 Am. Dec. 258.

³ *Turner v. Hitchcock*, 20 Iowa, 310; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *McGehee v. Shafer*, 15 Tex. 198; *Lord v. Tiffany*, 98 N. Y. 412; 50 Am. Rep. 689; see *Fitzgerald v. Smith*, 1 Ind. 310. Settling with one not liable is no bar: *Turner v. Hitchcock*, 20 Iowa, 310.

⁴ *Gilpatrick v. Hunter*, 24 Me. 18; 41 Am. Dec. 370.

⁵ *Ellis v. Bitzer*, 2 Ohio, 89; 15 Am. Dec. 534.

⁶ *Snow v. Chandler*, 10 N. H. 92; 34 Am. Dec. 140.

he might have recovered, and takes a judgment which is paid, he cannot sue another of the joint wrong-doers.¹

ILLUSTRATIONS. — A huntsman trespasses upon the plaintiff's grounds with his dogs, followed by a great number of people on foot and on horseback, who trample down and destroy crops. The huntsman is responsible for the whole injury: *Hume v. Oldacre*, 1 Stark. 351. A convict in the penitentiary received injuries while employed by contractors, under charge of the penitentiary officers, and he presented to the legislature a petition for relief, and a sum was granted to and received by him. *Held*, that this was a bar to any suit against the contractors, as the relief received from the state implied that the state was a joint wrong-doer: *Metz v. Soule*, 40 Iowa, 236. The plaintiff, in an action against several joint tort-feasors, executed to one of them a release under seal, acknowledging full satisfaction for the tort, but reserving his claim against the others. *Held*, that the release inured to the benefit of all the defendants, and that the reservation was inoperative: *Gunther v. Lee*, 45 Md. 60; 24 Am. Rep. 504. Plaintiff recovered judgment in an action of tort against one who was jointly liable with defendant, which judgment was satisfied in part, and afterwards brought this action for the same cause. *Held*, 1. That to constitute the first judgment a bar to this action, it must have been fully satisfied; and 2. That defendant having pleaded the first judgment in bar, both parties were concluded by it as to the measure of recovery in this action: *United Society of Shakers v. Underwood*, 11 Bush, 265; 21 Am. Rep. 214. Plaintiff brought separate actions for a joint trespass. Defendants in one of these actions paid the amount of the judgment into court, pending the other action. The clerk entered a satisfaction of record, but plaintiff refused to receive the money. *Held*, that he could not be deprived, without his consent, of the right to make his election: *Power v. Baker*, 27 Fed. Rep. 396.

§ 1045. **No Contribution among Wrong-doers — Exceptions.** — The general rule is, that there can be no contribution between wrong-doers.² If a person maintains a hatch-

¹ *Westbrook v. Mize*, 35 Kan. 299.

² *Merryweather v. Nixan*, 8 Term Rep. 186; *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218; 5 Am. Rep. 368; *Philadelphia v. Collins*, 68 Pa. St. 106; *Stone v. Hooker*, 9 Cow. 154; *Coventry v. Barton*, 17 Johns. 142; *Miller v. Fenton*, 11 Paige, 18; *Rhea v. White*, 3 Head, 121; *Spalding v. Oakes*, 42

Vt. 343; *Percy v. Clary*, 32 Md. 245; *Pearson v. Skelton*, 1 Mees. & W. 504; *Wooley v. Batte*, 2 Car. & P. 417; *Adams v. Jarvis*, 4 Bing. 66; *Colburn v. Patmore*, 1 Crompt. M. & R. 73; *Mitchell v. Cockburne*, 2 H. Black. 379; *Cumpston v. Lambert*, 18 Ohio, 81; 51 Am. Dec. 442; *Selz v. Unna*, 1 Biss. 521; 6 Wall. 327; *Minnis v. Johnson*,

way in his sidewalk unsafe for travelers, and another takes and leaves the cover off, and a traveler being injured thereby recovers damages against the occupant, the latter cannot recover indemnity of the intermeddler.¹ One of the parties to a joint trespass is not entitled, by satisfying the claims of the injured person, to take from him an assignment of his right of action for the injury, and sue his associates for damages in full, either in his own name or in that of his assignor.² One who has fraudulently suffered a judgment to be entered against him as administrator has no standing in court to compel his confederates in the fraud to account.³ But there may be contribution between fraudulent grantees of land, when the land conveyed to one of them is taken to pay the grantor's debts, — such contribution to be adjusted according to existing equities between the several grantees.⁴ Where the party who has been called on to respond in damages is a wrong-doer only by relation, he may recover indemnity from the real wrong-doer.⁵ Thus a carrier who has been compelled to pay damages for any injury caused by the carelessness of a servant may recover indemnity from that servant.⁶ Where the owner or occupant of premises creates a nuisance in the street or on the sidewalk adjoining the same, without the authority of the municipal authorities, either express or implied, and the city is compelled to pay damages to a person for a personal injury caused by the same, the author of such a nuisance will be responsible to the city for the damages so paid by it.⁷ Where an officer is induced, by the false statements of another as to the own-

1 Duvall, 171; *Churchill v. Holt*, 131 Mass. 67; 41 Am. Rep. 191; *Lowell v. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33; *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105; *Barid v. Midvale Steel Works*, 12 Phila. 255; *Nichols v. Nowling*, 82 Ind. 488; *Herr v. Barber*, 2 Mackey, 545; *Becker v. Farwell*, 25 Ill. App. 432.

¹ *Churchill v. Holt*, 131 Mass. 67; 41 Am. Rep. 191.

² *Upham v. Dickinson*, 38 Mich. 338.

³ *Sherner v. Spear*, 92 N. C. 148.

⁴ *Janvrin v. Curtis*, 63 N. H. 312.

⁵ *Lowell v. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33.

⁶ See Division I., Agency — Master and Servant.

⁷ *Gridley v. City of Bloomington*, 68 Ill. 47; *Lowell v. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33.

ership of certain property, to take it into his possession, and is sued and compelled to pay damages for so doing, he is entitled to indemnity from the party guilty of the fraud, and those assisting him therein.¹ Where a person is injured in passing over a defective bridge, which two counties are jointly bound to keep in repair, and recovers judgment of one county, the other is liable to contribution.² So there may be contribution where the wrong-doer was not intentionally a wrong-doer. "The rule that the wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."³

ILLUSTRATIONS.—Two men conspired to release their land from the lien of a mortgage by fraudulently procuring a sale to be made of the land of a third party, instead of their own. One of them was afterwards obliged to pay to the third party the amount of which he had been defrauded, under a decree in an equity court. *Held*, that the rule of no contribution between joint tort-feasors was inapplicable, and that contribution might be compelled: *Goldsborough v. Darst*, 9 Ill. App. 205. Plaintiff having constructed and operated a canal, and having built a bridge over it, which was a public thoroughfare, granted a right of way across it with right to erect and maintain a bridge to defendants, who allowed the bridge to get out of repair, whereby A was injured. *Held*, that both plaintiff and defendants were liable, and that plaintiff, having paid the full damage, could compel defendants to contribute: *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121. A constable, induced by A's representations that certain attached goods were his, let him have them. The owner sued the constable and recovered judgment, which the constable satisfied. *Held*, that he and A were not *in pari delicto*, and that he could sue A: *Simpson v. Mercer*, 144 Mass. 413.

¹ *Kenyon v. Woodruff*, 33 Mich. 310.

² *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218; 5 Am. Rep. 368.

³ *Adamson v. Jarvis*, 4 Bing. 66; *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105; *Avery v. Halsey*, 14 Pick. 174; *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218; 5 Am. Rep. 368; *Lowell v. R. R. Co.*, 23 Pick. 24; 34 Am. Dec.

33; *Moore v. Appleton*, 26 Ala. 633; *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663, the court saying that "the common-sense rule and the legal one are the same; namely, that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere."

§ 1046. **Joint Wrong-doers—Injury Sustained by One.**—Where two persons are engaged in the same unlawful enterprise or action, and in prosecuting it one is injured by the negligence of the other, he has no remedy.¹ But it is essential that the parties were engaged in the same illegal transaction.² The mere fact that a person was at the time breaking the law does not put him at the mercy of any other wrong-doer.³ Thus a party injured on the highway may have redress, although he was driving at the time at an illegal rate of speed.⁴ So one engaged in an illegal game may recover for an injury received while so engaged;⁵ and in a leading case in Massachusetts it was held that one of two persons engaged in trotting their horses for money contrary to law may recover damages of the other for willfully running him down.⁶

¹ *Wallace v. Cannon*, 38 Ga. 199; 95 Am. Dec. 385; *Martin v. Wallace*, 40 Ga. 54.

² *Wallace v. Cannon*, 38 Ga. 199; 95 Am. Dec. 385.

³ *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 417.

⁴ *Baker v. Portland*, 58 Me. 190; 4 Am. Rep. 274.

⁵ *Etchberry v. Levielle*, 2 Hilt. 40.

⁶ *Welch v. Wesson*, 6 Gray, 505, the court saying: "It appears from the bill of exceptions to have been fully proved upon the trial that the defendant willfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge that if this fact was established, no action could be maintained by the plaintiff to recover compensation for the damages he had

sustained, even though the injury complained of was willfully inflicted. Under such instructions, the jury returned a verdict for the defendant. We presume it may be assumed as an undisputed principle of law, that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, and depending in any degree upon, an illegal agreement, to which he himself had been a party: *Gregg v. Wyman*, 4 Cush. 322; *Woodman v. Hubbard*, 25 N. H. 67; 7 Am. Dec. 310; *Phalen v. Clark*, 19 Conn. 421; 50 Am. Dec. 253; *Simpson v. Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the court, which went far beyond it, and laid down a much broader and more comprehensive doctrine. Taking without qualification, and just as they were given to the jury, the instructions import that if two persons are engaged in the same unlawful enterprise, each of them, during the continuance of such engagement, is irresponsible for willful injuries done to the property of the other. No such proposition as this can be true. He who violates the law

In a recent Irish case, an action for assaulting and beating the plaintiff, and infecting her with venereal disease, it appeared that the plaintiff had, for a lengthened period, consented to illicit sexual intercourse with the defendant, in ignorance of the fact, willfully and deceitfully concealed by him, that he was affected with the disease, had she known of which she would not have consented to connection. The Irish court of appeal, after full argument and examination of all the cases, held that the action was not sustainable as for a constructive assault, as the concealment alleged to have vitiated the plaintiff's consent, as having been fraudulently obtained, did not consist of deceit as to the nature of the act itself to be done, and no duty of disclosure was imposed by the relation of the parties to each other capable of being enforced; and that an action of such a character was not maintainable, or fit to be tried in a court of justice, because the injury complained of was directly consequent on willful immorality, and though founded in tort,

must suffer its penalties; but yet, in all other respects, he is under its protection, and entitled to the benefit of its remedies. But in this case the plaintiff had no occasion to show, in order to maintain his action, that he was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse-trotting upon wagers for money is expressly declared by statute to be a misdemeanor, punishable by fine and imprisonment. But neither the contract nor the race had, as far as appears from the facts reported in the bill of exceptions, or from the intimations of the court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they

were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance, either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct, in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior to another."

came within the maxim, *Ex turpi causa non oritur actio*.¹ If two persons voluntarily engage in a fight, which implies a license by each that the other may strike him, this license being illegal and void, either party injured by the other may have his action for the battery.²

¹ *Hegerty v. Shine*, 7 Cent. L. J. 291; 8 Cent. L. J. 111. Pallas, C. B., said: "I base my judgment upon the ground that this cause of action arises out of an immoral and illegal transaction. It is a typical illustration of the maxim quoted at the bar, *Ex turpi causa non oritur actio*. A distinction was attempted to be made at the bar between the application of this principle to actions in tort and in contract, but there are many actions in tort to which it is undeniable that that principle must apply. For instance, if a prisoner in custody attempts to escape, and the officer in whose custody he is, in recapturing him, inflicts upon him a serious wound, no action will lie against the officer, because the act of the prisoner was an illegal one. But it is one thing to say that this maxim may not apply in case of a wrong, and it is another to say that a court of justice is bound to measure the wrong done, and to mete out the wages of iniquity. I think a court of justice is bound to say that such a contract is void for immorality. We have been told that there is a legal obligation on a court to go into the details involved in this immoral contract. I emphatically deny that. Whether in the form of contract or tort, an action in a court of justice will not lie on such a transaction, nor need it be pleaded as matter of defense. In answer to such an action, I think the immoral nature of the con-

tract ought to be pleaded, and it generally must be so; but if that opportunity be passed over, I will not undertake to say that it is not in the power of the judge at the trial to direct that the plaintiff be nonsuited. In the present case there was, I think, no necessity for pleading this defense. An action is brought for trespass to the person. That is denied, and accordingly the plaintiff must show that an assault was committed. The evidence proves that the act was done by the consent of the plaintiff, and therefore that she was not assaulted. In order to avoid the consent, she relies upon the fraud,—she asks the court to relieve her from the consequences of a consent which she in fact gave. This is not open to her, because if the contract be an immoral one, neither party can be allowed to enter into the consideration for it, whether to sustain the cause of action or to avoid the consent. The court should say, We decline to go into it, therefore the nonsuit must be allowed."

² *Cooley on Torts*, 159; citing *Boulter v. Clark*, Bull. N. P. 16; *Mathew v. Ollerton*, Comb. 218; *Logan v. Austin*, 1 Stew. 476; *Hannen v. Edes*, 15 Mass. 346; *Brown v. Gordon*, 1 Gray, 182; *Stout v. Wren*, 1 Hawks, 420; 9 Am. Dec. 653; *Bell v. Hansley*, 3 Jones, 131; *Dole v. Erskine*, 35 N. H. 503; *Adams v. Waggoner*, 33 Ind. 531; 5 Am. Rep. 230; *Bartlett v. Churchill*, 24 Vt. 218.

TITLE IX.
CONSPIRACY.

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CHAPTER L.

CONSPIRACY.

§ 1047. Conspiracy — When actionable.

§ 1048. Who liable.

§ 1049. Evidence.

§ 1050. Pleading.

§ 1047. **Conspiracy — When Actionable.**—A conspiracy is a combination of two or more persons, by concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.¹ Viewed as a crime punishable by indictment, the gist of a conspiracy is the unlawful confederacy to do an unlawful act or a lawful act for an unlawful purpose. And the offense is complete when the confederacy is made.² But in the civil law, a conspiracy, no matter how wicked or atrocious its designs, is not actionable unless it results in damage to the party suing.³ The damage, and not the conspiracy, is

¹ *State v. Mayberry*, 48 Me. 218; *State v. Rowley*, 12 Conn. 101; *Smith v. People*, 25 Ill. 17; *Commonwealth v. Hunt*, 4 Met. 111; *Alderman v. People*, 4 Mich. 414; *State v. Burnham*, 15 N. H. 396; *Hinchman v. Richie*, *Brightly* (Pa.) 143.

² *Commonwealth v. Judd*, 2 Mass. 337; 3 Am. Dec. 54; *Commonwealth v. Tibbetts*, 2 Mass. 538; *Commonwealth v. Warren*, 6 Mass. 74; *People v. Mather*, 4 Wend. 259; 21 Am. Dec. 122; *State v. Cawood*, 2 Stew. 360; *State v. Rickey*, 9 N. J. L. 293; *State*

v. Buchanan, 5 Har. & J. 317; 9 Am. Dec. 534; *Collins v. Commonwealth*, 3 Serg. & R. 220. See also *Respublica v. Ross*, 2 Yeates, 8; *Morgan v. Bliss*, 2 Mass. 112; *Commonwealth v. Hunt*, Thach. Crim. Cases (Mass.) 609; *People v. Richards*, 1 Mich. 216; 51 Am. Dec. 75.

³ *Herron v. Hughes*, 25 Cal. 555; *McHenry v. Sneer*, 56 Iowa, 649; *Douglass v. Winslow*, 52 N. Y. Sup. Ct. 439; *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340.

the gist of the action.¹ An act which if done by one alone constitutes no ground for an action on the case cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie.² And it is sufficient that damage results from the conspiracy, though the act contemplated was not done.³ A conspiracy is not actionable unless something is done in pursuance of the conspiracy which without the conspiracy would give a right of action.⁴ In an action on the case grounded on an alleged conspiracy by the defendants to injure the plaintiff, he cannot recover unless there is evidence that he sustained actual damage. The fact of conspiracy is simply matter of aggravation, and should be proved in order to entitle the plaintiff to

¹ *Tappan v. Powers*, 2 Hall, 277.

² *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340.

³ *Patten v. Gurney*, 17 Mass. 186; 9 Am. Dec. 141.

⁴ *Jones v. Baker*, 7 Cow. 445; *Adler v. Fenton*, 24 How. 407; *Sheple v. Page*, 12 Vt. 519; *Hutchins v. Hutchins*, 7 Hill, 104; *Page v. Parker*, 40 N. H. 47; 43 N. H. 363; 80 Am. Dec. 172; *Place v. Minster*, 65 N.Y. 89; *Patten v. Gurney*, 17 Mass. 186; 9 Am. Dec. 141; *Eason v. Petway*, 1 Dev. & B. 44; *Laverty v. Vanarsdale*, 65 Pa. St. 507; *Bowen v. Matheson*, 14 Allen, 499; *Herron v. Hughes*, 25 Cal. 555; *Parker v. Huntington*, 2 Gray, 124; *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340; *Hinchman v. Richie*, *Brightly* (Pa.) 143; *Fairbank v. Newton*, 50 Wis. 628. As to conspiracy in general, see note to *People v. Richards*, 51 Am. Dec. 82-94. In *Jones v. Baker*, 7 Cow. 445, the court said: "There is a difference between an action for a conspiracy upon a writ of conspiracy and an action on the case in nature of a conspiracy. The former must be against two or more; the latter may be against one. In the former, if all but one are acquitted, the plaintiff cannot have judgment, for his action fails; but it is otherwise in the latter

action: Com. Dig., Action upon the Case for a Conspiracy, c. 1. A writ of conspiracy properly so called did not lie at the common law in any case but where the conspiracy was to indict the party either of treason or capital felony, and a verdict had been rendered in his favor; and such writ must be brought against two at least. All the other cases of conspiracy in the books were but actions on the case; though it was usual in such actions to charge a conspiracy. Yet they might be brought against one: 1 Saund. 230, note 4; *Saville v. Roberts*, *Ld. Raym.* 378. *Saville v. Roberts* was an action against one only for procuring the plaintiff to be indicted of a riot. It was an action on the case, and was held to lie. The case of *Subley v. Mott*, 1 Wils. 210, was a special action on the case for a malicious prosecution. After verdict against one only, a motion was made in arrest; in answer to which it was argued that this was an action on the case founded on a wrong; where if any one be found guilty, the plaintiff should have judgment. And of that opinion was the whole court; and they considered such to be the settled law since the case of *Skinner v. Gunton*, 1 Saund. 230."

recover in one action against several.¹ In such an action alleging that the defendants combined and conspired together to defeat the right of plaintiff to receive and possess a certain lot of bedsteads which he had purchased of one of the defendants, he is not entitled to recover damages against such defendant for breach of the contract of sale.²

No action lies by a person against others for conspiring to induce one not to make him a gratuity by will,³ or to induce his debtor to put his property out of his hands,⁴ or to induce another to violate his contract,⁵ or by insurance companies, that they will not insure any boat on which a certain person is employed,⁶ or against several charged with conspiring together to procure, by perjuring themselves, the plaintiff's conviction of a crime, a *nolle prosequi* having been entered.⁷ A justice of the peace cannot maintain an action against two persons for having maliciously conspired together, by which he was induced to marry one of them, a minor, by reason of which he was subject to a penalty and costs.⁸ To conspire maliciously and vexatiously, and without reasonable or probable cause, to commence and actually commencing a suit in the name of a third party against the plaintiff, is not actionable, where no legal damage is alleged.⁹ Where A has agreed to sell property to B, C may, at any time before the title has passed, induce A not to let B have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B. In such a case, A alone is liable to B

¹ Kimball v. Harman, 34 Md. 407; 6 Am. Rep. 340.

² Kimball v. Harman, 34 Md. 407; 6 Am. Rep. 340.

³ Hutchins v. Hutchins, 7 Hill, 104.

⁴ Austin v. Barrows, 41 Conn. 287; Wellington v. Small, 3 Cush. 145; 50 Am. Dec. 719; Lamb v. Stone, 11 Pick. 527; Moody v. Burton, 27 Me. 427; 46 Am. Dec. 612; Benford v. Sanner, 40 Pa. St. 9; 80 Am. Dec. 545.

Contra, Penrod v. Morrison, 8 Serg. & R. 522; 2 Pen. & W. 126.

⁵ Cooley on Torts, 126; Kimball v. Harman, 34 Md. 507; 6 Am. Rep. 340. *Contra*, Lumley v. Gye, 2 El. & B. 216; Jones v. Stanly, 76 N. C. 355.

⁶ Orr v. Ins. Co., 12 La. Ann. 255; 68 Am. Dec. 770.

⁷ Garing v. Fraser, 76 Me. 37.

⁸ Cummins v. Scott, 6 Watts, 519; 31 Am. Dec. 493.

⁹ Cotterell v. Jones, 11 Com. B. 713.

for the breach of contract, and B cannot maintain an action against C for damages.¹ It is not illegal for the surety of a firm about to become insolvent to induce a member of the firm to use its property to discharge the debt upon which the surety is liable, and the other partners cannot maintain an action of conspiracy against their partner and the surety.² Although a combination among workmen of a particular trade to prevent other workmen from laboring at a less rate of wages than that prescribed by them is contrary to public policy, and may, if carried into effect by threats or acts of violence, amount to a criminal conspiracy, yet an agreement among workmen that they will not themselves work for less than a stipulated price is not contrary to law.³

A conspiracy to entice a citizen of one state to go into another state, where he may be arrested on civil process, is actionable;⁴ or to maliciously prosecute him;⁵ or to defame him, and ruin him in his profession;⁶ or to defraud a creditor by taking an assignment of a debtor's property and aiding him to leave the state;⁷ or to vex or harass a person by having him subjected to an inquisition of lunacy without cause.⁸ Where the parties to a judgment that has been paid combine to set it up as unsatisfied, and cause an execution to be levied on land on which the judgment, whilst in force, was a lien, but which the judgment debtor had conveyed to a third person, they are liable to such person's action, though the execution may

¹ *Ashley v. Dixon*, 48 N. Y. 430; 8 Am. Rep. 559.

² *Kirkpatrick v. Lex*, 49 Pa. St. 122.

³ *Master Stevedore's Ass'n v. Walsh*, 2 Daly, 1; *Sayre v. Louisville etc. Ass'n*, 1 Duvall, 143; 85 Am. Dec. 613.

⁴ *Phelps v. Goddard*, 1 Tyler, 60; 4 Am. Dec. 720. A right of action exists against two or more persons who, by concert of action, fraudulently and by false pretenses induce

the plaintiff to leave his business and his home and travel into another state: *Cook v. Brown*, 125 Mass. 503; 28 Am. Rep. 259.

⁵ *Dreux v. Domec*, 18 Cal. 83.

⁶ *Wildee v. McKee*, 111 Pa. St. 335; 56 Am. Rep. 271.

⁷ *Mott v. Danforth*, 6 Watts, 304; 31 Am. Dec. 468.

⁸ *Davenport v. Lynch*, 6 Jones, 545. *Aliter*, where it was not done maliciously and without cause: *Hinchman v. Richie*, Brightly (Pa.) 143.

be void, and the purchaser under it acquire no title to the land.¹

¹ *Swan v. Saddlemire*, 8 Wend. 676. In *Findlay v. McAllister*, 113 U.S. 104, the supreme court of the United States say: "*Penrod v. Mitchell*, 8 Serg. & R. 522, was an action on the case in the nature of a writ of conspiracy for fraudulently withdrawing the goods of the defendant in an execution from the reach of the plaintiff. It was not questioned that the action would lie. The court held that the measure of damages was the value of the goods thus withdrawn, and not the amount of the judgment on which the execution was issued. In *Mott v. Danforth*, 6 Watts, 304, it was held that a creditor, without judgment or execution, and even before his debt was due, might sue parties at law who conspire to defeat his right of collection by fraudulently concealing and converting the debtor's goods. See also, to the same effect, *Kelsey v. Murphy*, 26 Pa. St. 78. And see *Meredith v. Benning*, 1 Hen. & M. 584. The three cases last cited extend the rule further than the exigency of the present case requires, and further than this court has been disposed to go. These authorities establish the right of a judgment creditor to his action against rescuers of the person or goods of the debtor seized by the sheriff to satisfy the judgment, or against one who prevents the seizure of the debtor's goods on execution; and the principle on which they rest is directly in the face of the contention of the defendants in error, that the plaintiff has no legal interest in the taxes to be collected to pay his judgment, and has sustained no legal damages by the alleged acts of the defendants. We think they support the action in the present case. Of the authorities cited by the counsel for the defendant in error in support of the demurrer, the principal case is *Adler v. Fenton*, 24 How. 407, where it was held that an action would not lie by a creditor whose debt was not yet due, against his debtors and two others for a conspiracy carried into effect to enable the debtors fraudulently to dispose of their property, so as to hinder and defeat the creditor in the collection of his debt. Mr. Justice Campbell,

who delivered the opinion, put the decision of the court on the ground that to sustain the action it must be shown not only that there was a conspiracy, but that there were tortious acts in furtherance of it and consequent damage; that *Adler and Schiff*, the judgment debtors, were the lawful owners of the property, and had the legal right to use and enjoy or sell it at their pleasure, and the plaintiffs, being general creditors, had no interest in or lien upon it. There was, therefore, no wrong of which the plaintiffs could complain. In the other cases cited by the defendants (*Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 146; 50 Am. Dec. 719; *Smith v. Blake*, 1 Day. 258; *Burnet v. Davidson*, 10 Ired. 94; *Green v. Kimble*, 6 Blackf. 552; *Austin v. Barrows*, 41 Conn. 287; *Cowles v. Day*, 30 Conn. 410; *Moody v. Burton*, 27 Me. 427; 46 Am. Dec. 612; and *Bradley v. Fuller*, 118 Mass. 239), the plaintiff was merely a general creditor, and had no judgment, attachment, or lien, the enforcement of which was obstructed by the defendant, or the cases were otherwise inapplicable to the question in hand. In the present case there was a conspiracy, tortious acts in furtherance of it, and consequent damage to the plaintiff. The property seized by the collector was in the custody of the law. The tax-payers, for whose unpaid taxes it had been seized, had no longer any right to its possession or use, and could not sell or otherwise dispose of it. It was devoted by the law to be sold to raise a fund to pay the plaintiff's judgment. The plaintiff had, therefore, an interest which the law gave him in the property and its sale, and suffered a direct damage from the alleged acts of the defendant, by which a sale was prevented. The plaintiff, according to the averment of his petition, had recovered his judgment against the county; and he had obtained his *mandamus* to the county court directing it to levy and cause to be collected a special tax to pay the judgment. The collector of the county, in obedience to the orders of the county court, which were themselves

A conspiracy to obtain from a master mechanic money which he is under no legal obligation to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demand, is an illegal conspiracy; and the money thus obtained may be recovered back from the conspiring parties, who are also liable for all damages to the business of such mechanic occasioned by such illegal acts.¹ A conspiracy to ruin an

in obedience to the *mandamus* of the circuit court, was proceeding to collect the tax, and had levied on property to that end, and was about to sell it, when the threats and hostile demonstrations of the defendants defeated the sale, and the petition averred the defendants continued to overawe and intimidate the tax-payers of the county, so that they did not pay the tax, and the collector had not been able, by reason thereof, to collect the tax. The plaintiff cannot sue the collector, for he has done his duty, and no suit lies against him. Unless the plaintiff has a cause of action against the defendants, he is without remedy. To hold that the facts of this case do not give a cause of action against them would be to decide that a citizen might be subjected to a willful and malicious injury at the hands of private persons without redress; that an organized band of conspirators could, without subjecting themselves to any liability, fraudulently and maliciously obstruct and defeat the process of the courts issued for the satisfaction of the judgment of a private suitor, and thus render the judgment nugatory and worthless. Such a conclusion would be contrary to the principles of the common law, and of right and justice. It is no answer to the case made by the petition to say, as the defendants by their counsel do, that the judgment of the plaintiff is still in force and bearing interest, and the liability of the county still remains undisturbed. What is a judgment worth that cannot be enforced? The *gravamen* of the plain-

tiff's complaint is, that the defendants have obstructed, and continue to obstruct, the collection of his judgment, and he avers that he has been damaged thereby to the amount of his judgment and interest; in other words, that by reason of the unlawful and malicious conduct of the defendants, his judgment has been rendered worthless. To reply to this the judgment still remains in force on the records of the court is an inadequate answer to the plaintiff's cause of action."

¹ *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, the court saying: "We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal if not a criminal conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and if the parties succeeded in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated. This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of

actor by hisses, groans, etc., during his performances may be actionable, though the public have a right to manifest disapproval of an actor's performance. The wrong consists in the combination to do it unfairly and of malice.¹ In Minnesota, a complaint against a judge for maliciously conspiring with others to institute in his court a malicious prosecution against the plaintiff was held good on demurrer.² In an action against A, B, and C for a conspiracy to defraud such merchants and traders as they might be able to impose on by representing A, who was insolvent, as a man of large property, and safely to be trusted, evidence that the defendants made such representations to other persons than the plaintiff, in consequence of which such persons without the request of the defendants recommended A to the plaintiff, whereby the plaintiff was induced to give him credit, is admissible.³

ILLUSTRATIONS.—J., a merchant tailor, was engaged in carrying on a profitable trade in his line of business from New York to New Orleans, the successful prosecution of which depended upon a knowledge of certain things known to so few that his gains were very large. B. conspired with J.'s foreman, in J.'s absence, to obtain the secrets of the business; did obtain them, and was, in consequence, enabled to rival J. in his trade, and J. was otherwise injured. *Held*, that an action on the case lay against B. and the foreman, at the suit of J., for the conspiracy, and that one of the defendants might be convicted and the

business he will pursue, and to make his own contracts with whom he pleases, and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions: *Commonwealth v. Hunt*, 4 Met. 111; 38 Am. Dec. 346; *Boston Glass Manufactory v. Binney*,

4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499. . . . Freedom is the policy of this country. . . . The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both."

¹ *Gregory v. Brunswick*, 6 Man. & G. 205.

² *Stewart v. Cooley*, 23 Minn. 347; 23 Am. Rep. 690.

³ *Gardner v. Preston*, 2 Day, 205; 2 Am. Dec. 91.

other acquitted. "The damage is the gist of the action, not the conspiracy": *Jones v. Baker*, 7 Cow. 446. M. and seventeen others employed by R. as journeymen tailors conspired together to stop work simultaneously and return their work in an unfinished condition. This intention they carried out, and R. was damaged in losing the money which he would have received from the completed garments, as well as by the loss of customers and the injury to the character of his house for punctuality. *Held*, that the facts constituted a good cause of action against M. and his associates: *Mapstrick v. Ramge*, 9 Neb. 390; 31 Am. Rep. 415. The plaintiff, being the holder of certain county bonds, obtained a judgment against the county in the United States circuit court. He afterwards obtained a *mandamus* in the same court requiring the county court to levy a tax to pay the judgment. Certain citizens formed themselves into a "tax-payers' association," and succeeded, by threats and hostile demonstrations, in preventing its collection. *Held*, that they are liable to the plaintiff in damages: *Findlay v. McAllister*, 113 U. S. 104. At the suit of the owner of a patent for vulcanized rubber, A, a dentist, was enjoined from using the preparation. Believing that A disregarded the injunction, the owner employed B to ascertain. B procured C to apply to A for a set of teeth upon a plate of vulcanized rubber. A made the teeth upon such plate, delivered them to C, and received pay therefor. B and C reported the facts to the owner, and on their affidavits, proceedings for contempt were commenced against A. *Held*, that B and C were not liable for a conspiracy to induce A to violate the injunction; that the owner of the patent had a right to resort to this method of learning the facts, and that the communications of B and C to the owner of the patent were privileged: *Knowles v. Peck*, 42 Conn. 386; 19 Am. Rep. 542. A borrows money of B, and gives him an absolute deed of land as security, on a mutual understanding that it should be reconveyed on payment of the loan. C and D, conspiring against A, applied to him, and proposed to loan him a further sum and pay the debt to B, and hold the said land as security for both sums. They then falsely told B that they had made the proposed advances to A, and B thereupon conveyed said land to them; whereupon they represented to A's creditors that they had fairly purchased the land, and that A was insolvent, and advised them to attach his property, which was done, to A's ruin. *Held*, that A might recover against C and D: *Bulkley v. Storer*, 2 Day, 531. One of two partners who were in failing circumstances made a note in the name of the firm to A, for fifteen hundred dollars, on an agreement that the stock of the firm should be attached in a suit on the note, and the proceeds applied ratably to pay said partners' debts and the debts of the

firm. The attachment was made accordingly, and B, another creditor of the firm, afterwards attached the same stock, in a suit for his debt. The object of A's suit was explained at a meeting of creditors of the firm and of said partner on the day of the attachment, B being present. A obtained judgment on the note, and seasonably levied execution on the stock, which did not satisfy his judgment, and distributed part of the proceeds as above agreed, and tendered to B his ratable part, which he refused to take. B recovered judgment, and delivered execution thereon to the officer who attached, but not till more than thirty days after rendition of judgment, and it was returned unsatisfied. *Held*, that an action was maintainable by B against said partner and A for a conspiracy to prevent B from obtaining his debt from the property of the firm, which was insolvent: *Adams v. Paige*, 7 Pick. 542. Upon A's entering into partnership with B, the sum of twenty-seven thousand dollars was lent to A by C and D for two years, and put into the firm as A's share of the capital. Before this debt matured, C and D brought suit thereon, and A offered judgment, which offer was accepted by C and D, and execution levied on A's interest. In an action by B against A, C, and D, *held*, that this raised no presumption of a conspiracy by A, C, and D to break up the business: *Neudecker v. Kohlberg*, 81 N. Y. 297. Plaintiff charged that defendants, in pursuance of a plan to extort money from him, falsely accused him before a magistrate of obtaining goods from some of them under false pretenses, under which charge he was arrested. *Held*, that the offense of defendants was a conspiracy, and the making the false oath was a sufficient overt act: *Raleigh v. Cook*, 60 Tex. 428. A declaration charging the defendants with falsely and fraudulently conspiring to accuse the plaintiff with having gotten a single woman with child, and thereby procuring from him a large sum of money, *held*, fatally defective for not alleging that the charge was false to the defendants' knowledge, and for not stating the facts alleged to constitute the fraud: *Wright v. Bourdon*, 50 Vt. 494. Defendants, A, B, and C, combined together to obtain the goods of plaintiff without paying for them. The plan adopted was, that A should purchase the goods on credit, make a formal sale of them to B and C, and then abscond. This plan was carried out. *Held*, that an action for conspiracy to defraud could be maintained, although no affirmative fraudulent representations were made by A to induce a credit; that a concealment of the true nature of the transaction was sufficient: *Place v. Minster*, 65 N. Y. 89. A sheriff combines with a third person to levy an execution which he holds against principal and surety on the property of the surety only, and thereby makes him pay the debt, instead of the principal. *Held*, that he is not liable to an action by the

surety for this case: *Eason v. Petway*, 1 Dev. & B. 44. A was a shipping-master in B; the defendants, in pursuance of a conspiracy to injure A in his business, and control the business of the shipping-masters of B by compelling them to ship all their seamen from the defendants, had taken their men out of ships because A's men were in the same, and refused to furnish and ship men to him, and prevented men from shipping with him, and notified the public that they had laid him on the shelf, and publicly notified his customers and friends that he could not ship seamen for them, and prevented his getting men to ship, or getting employ as a shipping-master, and so broke up A in his business. The defendants were members of an association composed of keepers of seamen's boarding-houses, designed to control the business of shipping seamen by requiring the members to ship only for certain rates, and to endeavor to prevent their boarders from shipping in vessels where any of the crew were shipped from boarding-houses not in good standing with the association, etc. *Held*, that the declaration did not set forth a cause of action: *Bowen v. Matheson*, 14 Allen, 499. A confessed judgments to B, his creditor. Other creditors of A sued A and B for a conspiracy to defraud the plaintiffs. *Held*, that if the judgments were confessed in good faith in pursuance of B's legal remedy to collect the debt due him, the action would not lie: *Collins v. Cronin*, 117 Pa. St. 35. S. agreed to sell and deliver to plaintiff a quantity of cheese. Defendant, by fraudulent and false representations, induced S. to sell and deliver the cheese to him. The agreement between S. and plaintiff was not in writing, and was void under the statute of frauds, but it would have been performed by S. but for defendant's fraud. *Held*, that plaintiff could maintain an action against defendant for the damages sustained: *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30. A and B conspire together, A being irresponsible and B being the owner of real estate, that B shall make a formal application to loan-brokers for a loan on said real estate, the same being of value and undoubted security therefor, and the loan being one whose accomplishment was reasonably certain; and that A, upon the strength of such application and the promise of the use of the proceeds of such loan, shall seek for and obtain a temporary loan to satisfy a pressing debt of A's, and that when the money thus sought has been obtained, then the loan applied for shall be declined. *Held*, that the party loaning upon the strength of these acts and representations may hold both B and A responsible for the money thus loaned: *Lee v. Lement*, 26 Kan. 111.

§ 1048. **Who Liable.**—Where two or more have entered into a conspiracy to defraud the plaintiff, any act

done by either of the conspirators in furtherance of the common object, and in accordance with the general plan of the conspirators, becomes the act of all, and each conspirator is responsible for such act.¹ Where a man has combined and conspired with others to cheat and defraud the plaintiff in the sale of certain property by fraudulent concealments and misrepresentations, and the fraud has been perpetrated accordingly by some other member or members of the conspiracy, he will be liable, although he may not, individually, have made any fraudulent misrepresentations, or have fraudulently concealed anything in regard to the condition or qualities of the property in question.² Mere silent approval of an unlawful act does not render one liable as a conspirator.³ Something more than proof of a mere passive cognizance of fraudulent or illegal action of others is necessary; there must be something showing active participation of some kind.⁴ A member of an association is not merely, because of his membership, liable for a conspiracy entered into by the association to prosecute one for an offense of which he is not guilty.⁵ That a conspirator expected to derive no profit from the wrong is immaterial to his responsibility.⁶ It makes no difference at what time any one enters into the conspiracy, he becomes a party to every act which had been previously done by any of the others.⁷ In an action against several for deceit by false representations, a fraudulent combination to deceive and defraud must be shown; but when it is shown, any act of one in furtherance of the conspiracy is the act of all.⁸ But though a conspiracy be charged, and but one person is proved to be guilty, the plaintiff is entitled to recover against him as though he had been sued alone.⁹

¹ *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172.

² *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172.

³ *Brannock v. Bouldin*, 4 Ired. 61.

⁴ *Evans v. People*, 90 Ill. 384.

⁵ *Johnson v. Miller*, 63 Iowa, 529.

⁶ *Stockley v. Hornidge*, 8 Car. & P. 11.

⁷ *Hinchman v. Richie*, Brightly (Pa.) 143.

⁸ *Brinkley v. Platt*, 40 Md. 529.

⁹ *Jones v. Baker*, 7 Cow. 445; *Easin v. Westbrook*, 2 Murph. 329; *Buffalo Lub.*

ILLUSTRATIONS.—A conspires with B, who has no property, that B shall obtain goods on credit from C, and deliver them to A. B obtains the goods. *Held*, that B's act is the act of A, and A is liable to C: *Moore v. Tracy*, 7 Wend. 229. The plaintiff charged the defendants with a conspiracy to cheat and defraud him, whereby they fraudulently obtained from him a conveyance of a certain tract of land to one of them, and prayed that the conveyance might be canceled, and the title to the land be adjudged to him. *Held*, that a mere participation in the fraud practiced by the defendant to whom the conveyance was made was not of itself sufficient to render the other defendants liable: *Johnson v. Davis*, 7 Tex. 173. The defendant and other persons confederated together to fraudulently obtain and divide among themselves a large amount of public moneys. *Held*, that the law imposed upon the defendant, individually, a liability co-extensive with the money wrongfully abstracted, although a portion of it may have been received by other persons acting with him. Each wrong-doer may be proceeded against by seizure of his property and arrest of his person until actual satisfaction of the demand is secured, or a joint action may be brought against all: *People v. Tweed*, 5 Hun, 382.

§ 1049. **Evidence.**—When a connection between conspirators is once proved, the acts or declarations of one of them done in pursuance of the conspiracy may be offered in evidence against them all.¹ And evidence of the statements of alleged conspirators may be admitted before “absolute proof” of the conspiracy.² It is admis-

Co. v. Oil Co., 42 Hun, 153. Or one may be sued alone: *Id.*; *Laverty v. Vandersdale*, 65 Pa. St. 507, the court saying: “This is an action upon the case in the nature of a conspiracy against the defendants for falsely and maliciously combining and conspiring to prevent the plaintiff from obtaining employment as a school-teacher, and by reason of which combination and conspiracy he was deprived of employment as a school-teacher, and prevented from earning support for himself and his family as such. The damage sustained by the plaintiff is the ground of the action, not the conspiracy. ‘Where the action is brought against two or more, as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove

a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination is nothing, so far as sustaining the action goes, the foundation of it being the actual damage done to the party’: *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124.”

¹ *Tappan v. Powers*, 2 Hall, 277; *Bredin v. Bredin*, 3 Pa. St. 81; *Card v. State*, 109 Ind. 415; *Owens v. State*, 16 Lea, 1; *Tucker v. Finch*, 66 Wis. 17.

² *Miller v. Dayton*, 57 Iowa, 423.

sible when the fact of the conspiracy is *prima facie* established.¹ But until proof of a conspiracy is made, evidence of the acts is inadmissible.² Before admitting evidence of the acts or declarations of one who is claimed to have been a conspirator with another to commit any offense or actionable wrong, the judge must be satisfied that apart from them there are *prima facie* grounds for believing in the existence of the conspiracy.³ In such case, after the conspiracy has been consummated, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter.⁴ Actual conspiracy need not be proved; but it may be inferred from the action of the parties.⁵ Where it is in evidence that the defendants have acted in concert and made false and fraudulent representations in procuring from the plaintiff and others subscriptions for stock in a proposed company, evidence of the acts and declarations of the defendants, either in presence or absence of the plaintiff, or of each other, is admissible if corroborative of what has already been received, or if it sheds any light on the character of the transaction.⁶ In attachment, on the ground of the fraudulent concealment of property, a conspiracy to conceal having been proved, it is error to exclude statements of a participant in the conspiracy made while the conspiracy was in progress, although such person is not a party to the record.⁷ In an action against two for enticing away the plaintiff's wife, and inducing her to elope with one of the defendants, the declarations and conversations of this defendant during his absence with the plaintiff's wife are admissible in evidence against him,

¹ *Brown v. Herr*, 21 Neb. 113; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

² *Gaunce v. Backhouse*, 37 Pa. St. 350; *Solomon v. Kirkwood*, 55 Mich. 256.

³ *Danville Bank v. Waddill*, 31 Gratt. 469.

⁴ *Danville Bank v. Waddill*, 31 Gratt. 469.

⁵ *Jones v. Baker*, 7 Cow. 446. See *Newall v. Jenkins*, 26 Pa. St. 159.

⁶ *McCabe v. Burns*, 66 Pa. St. 356.

⁷ *Weinstein v. Reid*, 25 Mo. App. 41.

before proof of a conspiracy; and the co-defendant cannot object to their admission, the evidence not affecting him in any way.¹ In an action against several for a joint assault, evidence of misconduct on the part of some of the defendants before and after the assault, tending to show a conspiracy, should be limited in its application to those defendants against whom such acts are proved. It is not evidence against the others.²

§ 1050. **Pleading.**—Want of probable cause as well as malice need not be charged in the declaration.³ Whatever is done in pursuance of the conspiracy may be averred to be the act of all, though done individually.⁴ The means by which the injury was intended to be effected must ordinarily be stated in the complaint.⁵ In actions for fraud and conspiracy, where a combination for fraudulent purposes is relied upon, the complaint need only state the fact of the combination, its object, and the accomplishment thereof to the injury of the plaintiff. The various facts and circumstances relied on to establish the complicity of the defendants need not be set forth in detail.⁶ In a suit for conspiring to remove the plaintiff from office, special damage need not be alleged.⁷ Nor where the conspiracy is to charge the plaintiff with a crime.⁸ It is no bar to an action for conspiring fraudulently to induce the plaintiff to come into this state with intent to cause his arrest and compel him to settle a disputed claim that he submitted to the jurisdiction without pleading the illegality of his arrest in abatement.⁹ Where one, who, by a conspiracy entered into by several persons, has been deprived of certain real estate, brings an action and obtains a judgment therein directing the

¹ *Beeler v. Webb*, 113 Ill. 436.

² *Strout v. Packard*, 76 Me. 148; 49 Am. Rep. 601.

³ *Griffith v. Ogle*, 1 Binn. 172; *Hal-deman v. Martin*, 10 Pa. St. 369.

⁴ *Tappan v. Powers*, 2 Hall, 277.

⁵ *Setzar v. Wilson*, 4 Ired. 501.

⁶ *Yuguanzo v. Salomon*, 3 Daly, 153.

⁷ *Griffith v. Ogle*, 1 Binn. 172.

⁸ *Hood v. Palm*, 8 Pa. St. 237.

⁹ *Cook v. Brown*, 125 Mass. 503; 28 Am. Rep. 259.

cancellation of certain conveyances, and requiring the defendants to convey the property to him, and account for the rents and profits received by them, he may subsequently bring an action against a portion of the defendants to recover any damages sustained by him, in addition to those provided for in the first judgment.¹

¹ *Bruce v. Kelly*, 5 Hun, 229.

TITLE X.

ASSAULT AND BATTERY.

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CHAPTER LI.

ASSAULT AND BATTERY.

- § 1051. Assault and battery — What is an assault.
- § 1052. What is a battery.
- § 1053. Defenses — Intent essential — Accidental battery.
- § 1054. Consent.
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§ 1051. **Assault and Battery—What is an Assault.—**
An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented, the person not being actually touched.¹ An indiscriminate assault upon several persons is an assault upon each individual.² The following have been held to be assaults, viz.: Raising of the hand in anger, or shaking the fist, with an apparent purpose to strike, and suf-

¹ *People v. Yslas*, 27 Cal. 630; *Johnson v. Tompkins*, 1 Bald. 571; *State v. Malcolm*, 8 Iowa, 413; *State v. Davis*, 1 Ired. 125; 35 Am. Dec. 735. Most of the definitions of "assault" and "battery" are to be found in the

criminal reports, and are collected by the writers on criminal law, — Bishop, Wharton, Russell, and others. See also 3 Lawson's Criminal Defenses.

² *State v. Nash*, 86 N. C. 650; 41 Am. Rep. 472.

ficiently near to enable the purpose to be carried into effect;¹ the pointing of a loaded pistol at one who is within its range;² the pointing of a pistol not loaded at one who is not aware of that fact, and making an apparent attempt to shoot;³ shaking a whip or the fist in a man's face in anger;⁴ riding or running after him in a threatening and hostile manner with a club or other weapon;⁵ making an apparent attempt to ride over a person;⁶ striking with a club a horse which another is driving;⁷ brandishing a knife, and threatening a person with harm if he does not deliver up chattels;⁸ stopping and preventing a person by threats from passing along the highway;⁹ aiming an unloaded gun at a person and snapping it at him, the latter not knowing that it is unloaded;¹⁰ cutting the hair of a person;¹¹ making demonstrations against another, to such an extent as to compel him to go into an adjoining garden for the purpose of escaping.¹² So, following an angry controversy, a threatening movement in close proximity, accompanied by violent language in the nature of a threat, and by a much larger and more powerful man, causing one to fear injury, constitutes an assault.¹³ To seize the reins in front of the hands of the driver of a vehicle, and to direct another to take the horses by the heads and turn them, the latter doing so, is an assault, though there is no intention to wound.¹⁴

¹ *State v. Vannoy*, 65 N. C. 532; *Stephens v. Myers*, 4 Car. & P. 349.

² *Tower v. State*, 4 Ala. 354; *State v. Church*, 63 N. C. 15.

³ *R. v. St. George*, 9 Car. & P. 483; *Rapp v. Com.*, 14 B. Mon. 614; *Richels v. State*, 1 Sneed, 606; *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373; *State v. Smith*, 2 Humph. 457.

⁴ *People v. Yslas*, 27 Cal. 630.

⁵ *State v. Rawles*, 65 N. C. 334; *Martin v. Shoppee*, 3 Car. & P. 373. See *State v. Neely*, 74 N. C. 425, 21 Am. Rep. 496, where a man chasing a woman was held guilty of assault.

⁶ *State v. Sims*, 3 Strob. 137.

⁷ *Marentille v. Oliver*, 2 N. J. L. 380.

⁸ *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670.

⁹ *Bloomer v. State*, 3 Sneed, 66.

¹⁰ *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373.

¹¹ *Forde v. Skinner*, 4 Car. & P. 239.

¹² *Martin v. Shoppee*, 3 Car. & P. 373.

¹³ *Bishop v. Ranney*, 59 Vt. 316.

¹⁴ *People v. Moore*, N. Y. Sup. Ct., 1889.

But the following are not assaults, viz.: Words alone, without any demonstration of force,¹ or drawing a weapon, or presenting a pistol, accompanied by language which negatives an intent to employ it, as, "Were you not an old man," or, "If it were not assize time, I would," etc.;² nor drawing a pistol without presenting it;³ nor merely standing in another's way, and passively preventing his progress;⁴ nor a mere act of omission,⁵ or acts which merely embarrass and distress;⁶ nor to separate persons fighting;⁷ nor taking the windows from a room in which a person is in bed;⁸ nor using insulting language and picking up a stone about twelve feet from the prosecutor, but not offering to throw it;⁹ nor to resist an officer making an arrest without a warrant for a misdemeanor not committed in his view.¹⁰

ILLUSTRATIONS. — The plaintiff, a blind girl, taught music in the defendant's family one day every week, and passed the night in his house, lodging in a room assigned her by the defendant and his wife. One night at midnight the defendant came stealthily into her room, sat upon her bed, leaned over her, and solicited her to sexual intercourse, which she refused. *Held*, a trespass and an assault; that exemplary damages were proper; and that the question whether these acts would have injured a person of ordinary nerve and courage was immaterial: *Newell v. Witcher*, 53 Vt. 589; 38 Am. Rep. 703. A was advancing in a threatening attitude, with an intention to strike B, so that his blow would have almost immediately reached B, if he had not been stopped. *Held*, that it was an assault in point of law, though at the particular moment when A was stopped he was not near enough for his blow to take effect: *Stephens v. Myers*, 4 Car. & P. 349. The plaintiff being in the

¹ *State v. Mooney*, Phill. (N. C.) 434; *Warren v. State*, 33 Tex. 517; *Smith v. State*, 39 Miss. 521; *Hairston v. State*, 54 Miss. 693; *Keyes v. Devlin*, 3 E. D. Smith, 518.

² *Blake v. Barnard*, 9 Car. & P. 626; *Com. v. Eyre*, 1 Serg. & R. 347; *State v. Crow*, 1 Ired. 375; *Tuberville v. Savage*, 1 Mod. 3.

³ *Lawson v. State*, 30 Ala. 14; *Warren v. State*, 33 Tex. 517; *Woodruff v. Woodruff*, 22 Ga. 237.

⁴ *Innes v. Wylie*, 1 Car. & K. 257.

⁵ *R. v. Smith*, 2 Car. & P. 449.

⁶ *Stearns v. Sampson*, 59 Me. 568; 8 Am. Rep. 442.

⁷ *Griffin v. Parsons*, 1 Selw. 25.

⁸ *Meador v. Stone*, 7 Met. 147; *Stearns v. Sampson*, 59 Me. 568; 8 Am. Rep. 442.

⁹ *State v. Milsaps*, 82 N. C. 549.

¹⁰ *Commonwealth v. Bryant*, 9 Phila. 595.

defendant's workshop and refusing to quit when desired, the defendant and his servants surrounded him, and, tucking up their sleeves and aprons, threatened to break his neck if he did not go out, whereupon the plaintiff, apprehensive of violence, departed. *Held*, an assault: *Read v. Coker*, 13 Com. B. 850. Plaintiff went into defendant's store to buy a cloak. While she had it on, a floor-walker charged her with being a spy from a rival store, and ordered the saleswoman to take the cloak from off plaintiff, which the saleswoman did. *Held*, that defendant was liable as for an assault: *Geraty v. Stern*, 30 Hun, 426.

§ 1052. **What is a Battery.**—A battery is an injury actually done to the person of another in an angry and revengeful or rude and insolent manner.¹ It of course includes an assault.² Thus the following acts amount to a battery: Striking a person, or rudely laying hands on him;³ or jostling him; or spitting on him;⁴ or pushing him;⁵ or throwing anything upon him;⁶ or striking his clothes, or a cane in his hand;⁷ or cutting off one's hair;⁸ or upsetting a chair or carriage in which he is sitting;⁹ or riding a bicycle against another who is facing the other way, the walk being fourteen feet in width, and there being nothing to obstruct the view;¹⁰ or to handcuff a person arrested, there being no attempt to escape or fear of rescue;¹¹ or giving a woman candy to eat containing a deleterious substance;¹² or for a man without any innocent excuse to put his arm around the neck of another's wife against her will.¹³ But it is not a battery to touch another to attract his attention;¹⁴ nor to clap a man on the back in joke or play or friendship;¹⁵ nor to strike a horse which one is

¹ *Kirland v. State*, 43 Ind. 146; 13 Am. Rep. 386; *Com. v. Ruggles*, 6 Allen, 588; *Johnson v. State*, 35 Ala. 363.

² *Johnson v. State*, 35 Ala. 363.

³ *Cole v. Turner*, 6 Mod. 149; *United States v. Ortego*, 4 Wash. 534.

⁴ *James v. Campbell*, 5 Car. & P. 372; *R. v. Cotesworth*, 6 Mod. 172.

⁵ *State v. Baker*, 65 N. C. 322.

⁶ *Pursell v. Horn*, 8 Ad. & E. 604.

⁷ *R. v. De Longchamps*, 1 Dall. 114.

⁸ *Forde v. Skinner*, 4 Car. & P. 239.

⁹ *Hopper v. Reeve*, 7 Taunt. 698.

¹⁰ *Mercer v. Corbin*, Ind. (1889).

¹¹ *Griffin v. Coleman*, 4 Hurl. & N. 265; *Wright v. Court*, 4 Barn. & C. 596.

¹² *Com. v. Stratton*, 114 Mass. 303; 19 Am. Rep. 352.

¹³ *Goodrum v. State*, 60 Ga. 509.

¹⁴ *Coward v. Baddeley*, 4 Hurl. & N. 478.

¹⁵ *Williams v. Jones*, Hardin, 301. In an action for an assault, to which the defense was that the act complained

driving;¹ nor to push gently against one in making way through a crowd.²

§ 1053. **Defenses—Intent Essential—Accidental Battery.**—In a battery there must always be an intent, express or implied, to do the injury; and therefore an accidental hurt in which the actor was blameless is no battery.³ And one is not liable for an unintentional injury resulting from the exercise of his right of self-defense,⁴ as where one, in defending himself from the assault of another, struck a third person, mistaking him for the assailant.⁵ Trespass will not lie against a person for making an affidavit upon which another is unlawfully arrested, if he made the same with no knowledge of the purpose for which it was to be used, and did not intend to have it so used.⁶ But it is not essential that the precise injury which was done should have been designed.⁷ One who hurls a missile into a crowd may have no one in view as the object of injury, but he commits a battery upon the person struck.⁸ So if one shoot at a mark and hit a person, shooting at a mark being a dangerous act in

of was done in play, the judge ruled that if the defendant intended to do no bodily harm, and the parties were lawfully playing by mutual consent, and the act was no other than the plaintiff had reason to suppose would be in such play, the defendant was not liable; that whether the force used was reasonable was not to be determined by the results, but from the evidence of the force, and the circumstances and nature of the act; and that if the defendant intended to do the act, and the act was unlawful and unjustifiable, and caused bodily harm, the plaintiff could recover. On appeal it was held that the defendant had no ground of exception: *Fitzgerald v. Cavin*, 110 Mass. 153.

¹ *Kirland v. State*, 43 Ind. 146; 13 Am. Rep. 386. But *aliter*, if he is thrown: *Dodwell v. Burford*, 1 Mod. 24; *Bull v. Colton*, 22 Barb. 94. And

see *Clark v. Downing*, 55 Vt. 259; 45 Am. Rep. 612.

² *Cole v. Turner*, 6 Mod. 149.

³ *Cooley on Torts*, 164; *ante*, sec. 1013, Accidents; *Brown v. Kendall*, 6 Cush. 292. The defendant in an action for assault and battery may testify as to the intent with which he approached the plaintiff, and also as to what he thought the plaintiff was about to do with an ax which he raised in his hand: *Plank v. Grimm*, 62 Wis. 251.

⁴ *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615; *Morris v. Platt*, 32 Conn. 75.

⁵ *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615.

⁶ *Roth v. Smith*, 41 Ill. 314.

⁷ *Peterson v. Haffner*, 59 Ind. 130; 26 Am. Rep. 81.

⁸ *Scott v. Shepherd*, 2 W. Black. 892; *State v. Myers*, 19 Iowa, 517; *Conway v. Reed*, 66 Mo. 346; 27 Am. Rep. 354.

the vicinity of people, he is liable.¹ So if two persons fight, and unintentionally one strikes a third, this is a battery of the latter, and is not excused as mere accident, for the purpose was to strike an unlawful blow, to the injury of some one.² So an action lies for an unwarranted assault and battery, although not committed in anger; as where the defendant, seeing the plaintiff intoxicated, interfered to prevent a tumultuous quarrel, and in the scuffle that ensued the plaintiff's leg was broken.³

ILLUSTRATIONS. — A trespasser warned off the land by the owner assaulted the latter, who defended himself, and, while so doing, a gun which he had was accidentally discharged and injured the assailant. *Held*, that he could not recover for the injury: *Fossbinder v. Svitak*, 16 Neb. 499. A boy thirteen years of age, in sport, but wantonly, threw a piece of mortar at another boy, which accidentally hit a third boy and injured his eye. *Held*, that he was liable in damages to the latter in an action of assault and battery: *Peterson v. Haffner*, 59 Ind. 130; 26 Am. Rep. 81. The defendant, in striking with his whip at the seducer of his niece, and adopted daughter, with whom he was riding, accidentally hit the plaintiff. *Held*, that he was liable for an assault: *Corning v. Corning*, 6 N. Y. 97. A and B, school-boys, were in the school-yard together, and had been shooting with a bow and arrow, when, on some remark being made by A, B said, "I will shoot you." A ran into the school-house and hid behind a fire-board. B followed, and saying, "See me shoot that basket," discharged the arrow. At that moment A raised his head and the arrow struck him, destroying one of his eyes. There were a number of boys in the room at the time: *Held*, that B was liable for an assault: *Bullock v. Babcock*, 3 Wend. 391. The defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising the stick for that purpose, accidentally struck the plaintiff and injured him. In an action of trespass for the assault and battery, *held*, that the parting of the dogs was a lawful and proper act, which the defendant might do by the use of proper and safe means; and that if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor: *Brown v. Kendall*, 6 Cush. 292. A threw a

¹ *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55.

² *James v. Campbell*, 5 Car. & P. 372.

³ *Johnson v. McConnell*, 15 Hun, 293.

stick which struck the plaintiff, but it did not appear for what purpose the stick was thrown. *Held*, that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident: *Alderson v. Wais-tell*, 1 Car. & K. 358.

§ 1054. **Defenses—Consent.**—Consent of the party injured is a defense.¹ In an action by husband and wife for an assault and battery on her, it is a good defense that the act complained of was committed with the consent and at the request of the wife.² A party may recover for an assault and battery, although he and his adversary fought by mutual consent.³ And consent obtained by fraud is no defense.⁴

ILLUSTRATIONS. — The mistress of a female servant, believing her to be *enceinte*, sent for a doctor to examine her. Upon the doctor's arrival, the servant remonstrated, but ultimately, upon being told that she must do so, submitted reluctantly to the examination. The suspicion proved to be unfounded. The servant subsequently brought an action of assault against her master and mistress and the doctor. *Held*, that there was no evidence to show that what was done was against the plaintiff's will, and that, in the absence of any evidence of force, violence, or coercion, neither the mistress nor the doctor was liable: *Latter v. Braddell*, 12 Cent. L. J. 282.

§ 1055. **Defenses—Defense of Person.**—It is a defense to an action for an assault and battery that it was committed while the defendant was exercising his right of self-defense.⁵ But the rule in criminal cases as to self-defense,⁶ that the person assailed must not use excessive force in

¹ *State v. Beck*, 1 Hill (S. C.) 363; 26 Am. Dec. 190; *Champer v. State*, 14 Ohio St. 437; *Fitzgerald v. Cavin*, 110 Mass. 153; *Smith v. State*, 12 Ohio St. 466; 80 Am. Dec. 355; *Duncan v. Com.*, 6 Dana, 595. See 3 Lawson on Criminal Defenses, and *ante*, sec. 1046, Joint Wrong-doers — Injuries Sustained by One.

² *Pillow v. Bushnell*, 5 Barb. 156.

³ *Bell v. Hansley*, 3 Jones, 131; *Stout v. Wren*, 1 Hawks, 420; 9 Am. Dec. 653; *Logan v. Austin*, 1 Stew.

476; *Adams v. Waggoner*, 33 Ind. 53; 5 Am. Rep. 231; *Com. v. Collberg*, 119 Mass. 530; 20 Am. Rep. 328.

⁴ *Com. v. Stratton*, 114 Mass. 303; 19 Am. Rep. 350. But see *Stearns v. Sampson*, 59 Me. 568; 8 Am. Rep. 442.

⁵ *Paxton v. Boyer*, 67 Ill. 132; 16 Am. Rep. 615; *Morris v. Platt*, 32 Conn. 75.

⁶ See 1 Lawson on Criminal Defenses, where all the cases on self-defense are collected.

defending himself, nor inflict unnecessary injuries in repelling slight injuries, nor take life unless life or limb is in peril, and he cannot escape by retreating, applies also in the civil action.¹ So one who provokes and brings on an affray cannot claim that he beat his adversary in self-defense, however imminent the danger to which he was exposed during the affray.² When a party is assaulted, the degree of force which he may employ in repelling the assault depends to some extent upon the known character of the assailant, whether peaceable or quarrelsome.³ A person assaulted cannot use force in self-defense, if there are other means available which appear to him sufficient.⁴ He is not justified in using a knife or other dangerous weapon, where the circumstances do not show any reasonable apprehension of great bodily harm.⁵ If the party attacked uses excessive force, he becomes a trespasser himself, and his assailant may recover damages for the excessive force used.⁶ Though the contrary has been held in New York,⁷ each party has a right of action against the other,—one for the original assault, and the other for the excessive force used in repelling it.⁸ The force that

¹ *Baldwin v. Hayden*, 6 Conn. 453; *Taylor v. Clendening*, 4 Kan. 524; *Murray v. Bosque*, 42 Mo. 472; *Floyd v. State*, 36 Ga. 91; 91 Am. Dec. 760; *State v. Bryson*, 1 Winst. 86; *Cummins v. Crawford*, 88 Ill. 312; 30 Am. Rep. 558; *Marks v. Brown*, 1 Tenn. 87; 25 Am. Rep. 764. In an action for damages for a willful assault and battery, the rule of contributory negligence on plaintiff's part does not apply. The person assaulted is not bound to retreat: *Steinmetz v. Kelly*, 72 Ind. 442; 37 Am. Rep. 170.

² *Jones v. Gale*, 22 Mo. App. 637. See *Norris v. Casel*, 90 Ind. 143.

³ *Harrison v. Harrison*, 43 Vt. 417.

⁴ *Howland v. Day*, 56 Vt. 318.

⁵ *Close v. Cooper*, 34 Ohio St. 98.

⁶ *Cockcroft v. Smith*, Salk. 642; *Dole v. Erskine*, 35 N. H. 503; *Bartlett v. Churchill*, 24 Vt. 218; *Philbrick v. Foster*, 4 Ind. 442; *Elliott v. Brown*, 2 Wend. 497; 20 Am. Dec. 644; *Curtis*

v. Carson, 2 N. H. 539; *Brown v. Gordon*, 1 Gray, 182.

⁷ *Elliott v. Brown*, 2 Wend. 497; 20 Am. Dec. 645.

⁸ *Ogden v. Claycomb*, 52 Ill. 365; *Gizler v. Witzel*, 82 Ill. 510; *Bobb v. Bosworth*, Litt. Sel. Cas. 81; 12 Am. Dec. 273; *Dole v. Erskine*, 35 N. H. 503, the court saying: "Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense, he has committed no breach of the peace, and has done no act for which he is liable, while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery which the assailant himself has committed be merged in or

a person may employ to defend himself he may likewise employ to defend his wife, his child, or other member of his family.¹ And it is as unlawful for a grown son or daughter to create a disturbance in the family as for a mere stranger; the father may as rightfully interpose to preserve the good order and propriety of his household in the one case as in the other, and such interference will not be an assault.²

set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given wiped out by the excessive castigation he receives from the other party, then each party may maintain an action, the one that is assailed for the assault and battery first committed upon him, and the assailant for the excess of force used upon him beyond what was necessary for self-defense. We think that these are not matters of set-off; that the one cannot be merged into the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force. And, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that had elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then, for the first time, becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then and one committed by him on the same person the day after? In *Elliott v. Brown*, it is conceded that both parties may be

indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear. We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received; the assailed party for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defense. This rule, it appears to us, will do more justice to the parties, and more credit to the law, than the other; for by it the party who commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist."

¹ *Com. v. Malone*, 114 Mass. 295; *Patten v. People*, 18 Mich. 314; 100 Am. Dec. 173; *State v. Gibson*, 10 Ired. 214; *Hathaway v. Rice*, 19 Vt. 102; *Obier v. Neal*, 1 Houst. 449; *Hill v. Rogers*, 2 Iowa, 67.

² *Smith v. Slocum*, 62 Ill. 354.

ILLUSTRATIONS.—A grown daughter, who had been married and had left her husband and was living in her father's family, got into an angry dispute with a hired girl, and when ordered by her father to leave and go to her own room, refused to do so, and in her dispute with her father made remarks imputing a want of chastity in her stepmother in her presence and in that of several others. *Held*, that the father had a right to protect his wife from such slanderous abuse the same as from a mere stranger, and to exercise his authority as the head of the family in moderation to preserve the order of his family; and if in so doing he used no more force than was necessary, he was not liable in trespass: *Smith v. Slocum*, 62 Ill. 354.

§ 1056. **Defense of Property.**—One may also justify an assault or battery committed in defending his possession of property, either personal or real, subject to the same restriction that he must not employ excessive force.¹ The owner of land may, by the use of reasonable and necessary force, resist an attempt by the former occupant to retake possession.² A man assaulted in his dwelling is not obliged to retreat, but may defend his possession to the last extremity.³ He may kill a burglar breaking in.⁴ Ordinarily, in defense of possession an assault and battery are justifiable, but a wounding is not; but in defending an assault by the intruder, a wounding is justifiable.⁵

So he has a right to remove an intruder from his premises, or one who, being there, uses indecent or abusive language, or disturbs the peace of the family, or commits

¹ Cooley on Torts, 167; *Abt v. Burgheim*, 80 Ill. 92; *Ayres v. Birtch*, 35 Mich. 501; *Stachlin v. Destrehan*, 2 La. Ann. 1019; *Gregory v. Hill*, 8 Term Rep. 299; *Parsons v. Brown*, 15 Barb. 590; *Scribner v. Beach*, 4 Denio, 448; 47 Am. Dec. 265; *Gates v. Lounsbury*, 20 Johns. 427; *McCarthy v. Fremont*, 23 Cal. 196; *Newkirk v. Sabler*, 9 Barb. 652; *Beecher v. Parmele*, 9 Vt. 352; 31 Am. Dec. 633. And see *ante*, sec. 1035, Recaption. To an action for throwing water over the plaintiff's apartment and herself, it is no plea that the plaintiff was engaged in obstructing an ancient

window of the defendant's house, and the defendant threw water over her to prevent it: *Simpson v. Morris*, 4 Taunt. 821.

² *Bliss v. Johnson*, 73 N. Y. 529.

³ *Pond v. People*, 8 Mich. 150; *Pitford v. Armstrong*, Wright, 94.

⁴ *McPherson v. State*, 22 Ga. 478. See, further, *Thompson v. State*, 55 Ga. 47; *Palmore v. State*, 29 Ark. 248; *Wall v. State*, 51 Ind. 453; *State v. Stockton*, 61 Mo. 382.

⁵ *Shain v. Markham*, 4 J. J. Marsh. 578; 20 Am. Dec. 232.

an assault upon them, using the necessary force to do so.¹ This right extends to the owner himself,² to a member of his family,³ to a tenant,⁴ to mechanics in charge of a building which they are erecting.⁵ And this right extends both to the house, the office, and the store.⁶

The occupant of a building has a right to admit whom he pleases to enter and remain, to expel any one who abuses the privilege, and to lay hands on the person to expel him, if necessary. But where one has invited or permitted another to enter, he cannot justify an assault to expel him if the conduct for which the person is sought to be forcibly expelled was occasioned by the owner's abuse.⁷ Where a person enters a dwelling with violence, he may be ejected by force without being first requested to leave.⁸ But if he enters quietly, he must first be requested to leave.⁹ Although a right of way with gates restricts the use to that extent, the removal of the gates does not work such an immediate, and absolute forfeiture

¹ Woodman v. Howell, 45 Ill. 367; 92 Am. Dec. 221; Beecher v. Parmele, 9 Vt. 352; 31 Am. Dec. 633; People v. Payne, 8 Cal. 341; People v. Batchelder, 27 Cal. 69; McCarthy v. Fremont, 23 Cal. 196; Pitford v. Armstrong, Wright, 94; Shaw v. Chartie, 3 Car. & K. 21; Mugford v. Richardson, 6 Allen, 76; 83 Am. Dec. 617. But if he use more force than is necessary he becomes a trespasser *ab initio*: Jones v. Jones, 71 Ill. 562; Abt v. Burgheim, 80 Ill. 92.

² Parsons v. Brown, 15 Barb. 590, and cases in last note.

³ Tribble v. Frame, 7 J. J. Marsh. 599; 23 Am. Dec. 439.

⁴ Corey v. People, 45 Barb. 262.

⁵ United States v. Bartle, 1 Cranch C. C. 236.

⁶ Woodman v. Howell, 45 Ill. 367; 92 Am. Dec. 221. In Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508, the court say: "The third instruction for the plaintiff was erroneous, because while recognizing the right of defendant to use a deadly weapon in defense of his person against threatened danger of greater personal injury even to

the extent of taking the life of his assailant, it utterly ignored and failed to give recognition to an equal right of defendant to do the same thing in defense of his office, which *pro hac vice* was as much his dwelling as the house ordinarily known by that appellation. And this right of defending one's dwelling is in some sense superior to that of the defense of his person; for in the latter case, it is frequently the duty of the assaulted to flee if the fierceness of the assault will permit, while in the former, a man assaulted in his dwelling is not obliged to retreat, but may stand his ground, defend his possession, and use such means as are absolutely necessary to repel the assailant from his house, even to the taking of life: Pond v. People, 8 Mich. 150, and cases cited; 3 Greenl. Ev., secs. 65, 117; State v. Patterson, 45 Vt. 308; 12 Am. Rep. 200; Parsons v. Brown, 15 Barb. 590."

⁷ Watrous v. Steel, 4 Vt. 629; 24 Am. Dec. 648.

⁸ Tullay v. Reed, 1 Car. & P. 6.

⁹ Tullay v. Reed, 1 Car. & P. 6; State v. Woodward, 50 N. H. 527.

as to justify the use of force to the extent of an assault and battery to prevent the further use of the way.¹ Where one has entered another's house for a lawful purpose, he may not be ejected until that purpose is accomplished; as, for example, a person who enters the office of a public officer,² or one who has entered a dwelling to serve a subpoena.³ If a chattel, sold on condition that until paid for no title shall vest in the purchaser, and that if not paid for as agreed the seller shall have the right to enter upon the premises of the purchaser and take the chattel away, is taken to a room hired by the purchaser in the house of a third person who has no knowledge of his title, the seller, on breach of the condition in regard to payment, has a right to enter such house in a reasonable manner to get the chattel; but if the purchaser of the chattel is absent, and the wife of the owner of the house, in the absence of her husband, requests the seller to wait two hours until the purchaser returns, it is not reasonable for the seller to push the wife aside and enter, and if he does so, an action may be maintained against him for an assault, although he shows the agreement to her, and tells her for what he has come.⁴ An owner of land who forcibly enters thereon, and ejects, without unnecessary force, a tenant at sufferance, who has had reasonable notice to quit, is not liable to an action for an assault.⁵ If a tenant at will surrenders the premises by an express agreement with the owner, and vacates them with his family and goods, leaving behind a person who has occupied the premises with him by his permission, but without the owner's knowledge or consent, the owner is not liable to

¹ *McMillan v. Cronin*, 75 N. Y. 474.

² Any person has a right, though merely from motives of curiosity, to enter the office of a clerk of court, when open for public business, and remain so long as he conducts himself properly, and does not impede the business; and an action of trespass

will lie against a clerk who ejects him therefrom: *O'Hara v. King*, 52 Ill. 303.

³ *Hagar v. Danforth*, 20 Barb. 16; 8 How. Pr. 16.

⁴ *Drury v. Hervey*, 126 Mass. 519.

⁵ *Low v. Elwell*, 121 Mass. 309; 23 Am. Rep. 272.

an action for an assault if he ejects such person after request and refusal to leave the premises, using no unreasonable force.¹ If the owner of land wrongfully held by another enters and expels the occupant, but makes use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum fregit*, nor for assault and battery, nor for injury to the occupant's goods, although in order to effect such expulsion and removal it becomes necessary to use so much force and violence as to subject him to indictment at common law for breach of the peace, or under the statute for making a forcible entry.² But a person cannot justify an assault by showing that he had a right to enter the plaintiff's land to remove his property, but the plaintiff withstood his entry.³ A statute making it a misdemeanor for one to go on the cultivated lands of another, and refuse to depart therefrom when so requested by the owner, does not deprive the owner of his common-law right to expel with reasonable force a trespasser on his land who refuses to leave on request.⁴ A person is not justified in entering the land of another against his will for the purpose of fox-hunting.⁵ The occupant of part of a highway for purpose of a funeral under his control has a right to direct the order in which the carriages shall form in the procession, and the drivers thereof have a right to follow such directions. A hackman has a right to use all reasonable force to prevent another from occupying a position in a funeral procession to which he has been assigned by the one in charge thereof.⁶

ILLUSTRATIONS. — In an action of assault and battery against an officer for forcing a door and removing a covering from plaintiff's face in order to identify her so as to make service

¹ *Stone v. Lahey*, 133 Mass. 426.

² *Manning v. Brown*, 47 Md. 506.

³ *Churchill v. Hulbert*, 110 Mass. 42; 14 Am. Rep. 578.

⁴ *Fossbinder v. Svitak*, 16 Neb. 499.

⁵ *Paul v. Summerhayes*, L. R. 4 Q. B. Div. 9; L. J. 48 M. C. 33; 27

Week. Rep. 215.

⁶ *Goodwin v. Avery*, 26 Conn. 585;

68 Am. Dec. 410.

upon her, *held*, that defendant was justified in using sufficient force to secure an identification: *Hull v. Bartlett*, 49 Conn. 64. Deceased, who was in the habit of carrying concealed weapons, was a dangerous man, and had previously made violent threats against defendant, entered defendant's office, commenced an angry altercation with him, and when ordered to leave, refused, in an angry and abusive manner. Defendant attempted to put him out by force; deceased caught defendant by the throat, choking him and pulling him toward the door, when defendant, in attempting to stay himself, placed his hand upon a notary's seal near by, and, raising it, struck deceased on the head, from which blow he fell out of the door, and shortly after he died, either from the blow or the fall on the pavement. *Held*, that the refusal to instruct the jury to render a verdict for defendant on this state of facts was error: *Morgan v. Durfee*, 69 Mo. 469; 33 Am. Rep. 508. The plaintiff went on defendant's premises with a sled, and loaded it with the defendant's slabs, without right. *Held*, that the defendant might repossess himself of the slabs, using sufficient force against the plaintiff's person to enable him to retake them: *Johnson v. Perry*, 56 Vt. 703; 48 Am. Rep. 826. A went to the house of B to demand a debt which B said he could not pay; angry words passed, and B told A to leave his house; this A refused to do unless he was paid. Upon this, B sent for a police-officer, and had A locked up in the watch-house. *Held*, that if A was making a disturbance, B would have been justified in turning him out of his house, but that he was not justified in imprisoning him: *Green v. Bartram*, 4 Car. & P. 308. A was on land, claiming it under a contract of purchase. The vendor and his wife attempted forcibly to eject A, who forcibly resisted. *Held*, in the vendor's wife's assault suit, that it was error to ignore the fact that A claimed title: *Franck v. Wiegert*, 56 Mich. 472.

§ 1057. **Preventing Breach of Peace.**—One may justify force used in a forcible interference to prevent a breach of the peace.¹ But where a self-constituted vigilance committee flogged a disreputable character who refused to leave town as ordered, it was held that he was entitled to damages irrespective of the motives of the wrong-doers, and of his own calling or condition in life.²

¹ *Mellen v. Thompson*, 32 Vt. 407; ² *Boyle v. Case*, 18 Fed. Rep. Timothy v. Simpson, 6 Car. & P. 500; 880.
Noden v. Johnson, 16 Q. B. 218.

§ 1058. **In Domestic Relations.**—In certain relations a person may use force without being liable for assault. For example, the master of a ship is allowed to flog a sailor in proper cases;¹ and a father may administer moderate chastisement to a child;² or a school-master to a scholar.³

§ 1059. **Innkeepers — Common Carriers — Religious Meetings, etc.**—An innkeeper may eject from his house a person to whom he owes no duty to provide shelter, or who misconducts himself there,⁴ and a common carrier has similar rights.⁵ A person disturbing a religious meeting may be ejected with force sufficient for the purpose.⁶ But before a person can be turned out of a church, he should be requested to retire.⁷

§ 1060. **Damages—Measure of.**—The plaintiff in such actions may recover such general damages as he may show he has suffered from the assault.⁸ He may recover when an assault is proved, though no special damage is shown.⁹ He may recover for his loss of time,¹⁰ for the amount of surgeon's bill incurred for treating his injuries, though voluntarily paid before trial by the trustees of the township, to whom he is not legally liable to refund the amount.¹¹ And he may recover for not only his direct pecuniary loss, but for personal suffering,¹² for mental anguish,¹³

¹ *United States v. Hunt*, 2 Story, 120; *Bangs v. Little*, 1 Ware, 506; *Brown v. Howard*, 14 Johns. 119. See Division III., Ships and Shipping.

² See Division I., Parent and Child.

³ See Division IV., Schools.

⁴ See *post*, Bailments — Innkeepers.

⁵ See *post*, Bailments — Common Carriers. A lewd woman, by artifice, gained admission to the ladies' waiting-room of defendant's station some hours before the train was to leave, which she said she wished to take, and was there guilty of misconduct, and was removed by the police, but without force, at request of defendant's agent. *Held*, that she was entitled to only nominal damages, if any: *Beeson v. R. R. Co.*, 62 Iowa, 173.

⁶ *Wall v. Lee*, 34 N. Y. 141; *Beck-*

ett v. Lawrence, 7 Abb. Pr. (N. S.) 403; *McLain v. Matlock*, 7 Ind. 525; 65 Am. Dec. 746.

⁷ *Ballard v. Bond*, 1 Jur. 7.

⁸ *Anderson v. Stone*, 10 Minn. 72; *Coffin v. Coffin*, 4 Mass. 41; 3 Am. Dec. 189; *Slater v. Rink*, 18 Ill. 529.

⁹ *Lewis v. Hoover*, 3 Blackf. 407; *Andrews v. Stone*, 10 Minn. 72.

¹⁰ *Morgan v. Curley*, 142 Mass. 107.

¹¹ *Klein v. Thompson*, 19 Ohio St. 569.

¹² *Smith v. Holcomb*, 97 Mass. 552; *Klein v. Thompson*, 19 Ohio St. 567. Where a prisoner was seized by a mob and hanged by his neck till he was almost senseless, to extort a confession, it was held that fifteen hundred dollars was not excessive damages: *Elliott v. Russell*, 92 Ind. 526.

¹³ *Smith v. Holcomb*, 99 Mass. 552;

and the outrage and indignity which have accompanied the injury.¹ He cannot recover his expenses in prosecuting the suit.² It is the right and duty of the jury in assessing damages in an action of trespass for an assault to consider what effect the finding of trivial damages would have to encourage a disregard of the laws and disturbances of the public peace, and it is not error for the court to so instruct them.³

§ 1061. **Aggravation of.**—In actions of assault and battery where malice and disregard of the law are present, exemplary damages are recoverable;⁴ although the defendant has been convicted and fined for the same offense.⁵ In aggravation of damages, evidence of previous threats made by the defendant in the plaintiff's presence is admissible.⁶ So is evidence of his conduct and language

Canning v. Williamstown, 1 Cush. 451; *Wadsworth v. Treat*, 43 Me. 163; *Ford v. Jones*, 62 Barb. 484; *Gronan v. Kucuk*, 59 Iowa, 18.

¹ *McKinley v. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Morgan v. Curley*, 142 Mass. 107. In an action for assault and battery of an indecent nature, plaintiff may recover for injury to reputation, social position, sense of shame, and loss of honor: *Wolf v. Trinkle*, 103 Ind. 355.

² *Howell v. Scoggins*, 48 Cal. 355. The jury may allow, as making up the damages, reasonable counsel fees; but no evidence can be introduced of the value of the services: *Stevenson v. Morris*, 37 Ohio St. 10; 41 Am. Rep. 481. Where it appeared that there had been a former trial of the cause, and by reason of the death of one of the jurors no verdict was rendered, it was held that the jury might properly take into consideration the expenses of such former trial in estimating the damages: *Noyes v. Ward*, 19 Conn. 250. A assaulted B, and commenced an affray with him, in which B fired a pistol and injured C. Held, that if C brought an action against B and recovered damages for

the injury, this would not give B a legal right to recover that amount, as so much to be reimbursed to him; as special damages, in an action against A: *Whatley v. Murrell*, 1 Strob. 389.

³ *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373.

⁴ *Smithwick v. Ward*, 7 Jones, 64; 75 Am. Dec. 453; *Rowe v. Moses*, 9 Rich. 423; 67 Am. Dec. 560; *McCarthy v. Niskern*, 22 Minn. 90; *Wiley v. Keokuk*, 6 Kan. 94, 111; *Guengerich v. Smith*, 36 Iowa, 587; *Drohu v. Brewer*, 77 Ill. 280; *Elliott v. Van Buren*, 33 Mich. 49; 20 Am. Rep. 668; *Reddin v. Gates*, 52 Iowa, 210; *Heneky v. Smith*, 10 Or. 349; 45 Am. Rep. 143. *Contra*, *Taber v. Hutson*, 5 Ind. 322; 61 Am. Dec. 96; *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270; *Huber v. Teuber*, 3 McAr. 484; 36 Am. Rep. 110.

⁵ *Corwin v. Walton*, 18 Mo. 71; 59 Am. Dec. 285; *Hoadley v. Watson*, 45 Vt. 289; 12 Am. Rep. 197. But such fact is admissible in mitigation: *Smithwick v. Ward*, 7 Jones, 64; 75 Am. Dec. 453.

⁶ *Sledge v. Pope*, 2 Hayw. (N. C.) 402. But see *Hallowell v. Hallowell*, 1 T. B. Mon. 130.

at the time.¹ And all the circumstances may be shown in aggravation of damages;² and of other trespasses to his person or that of his family;³ and the record of defendant's conviction on his plea of guilty in a criminal prosecution.⁴ Evidence of express malice is admissible, though not averred in the petition.⁵

ILLUSTRATIONS.—A pregnant woman was, without provocation, assaulted by a drunken person who threatened her with a drawn revolver, and so frightened her that she ran and fell, and three days thereafter was delivered of a dead child. *Held*, to be entitled to exemplary damages: *Barbee v. Reese*, 60 Miss. 906. The defendant broke open a house occupied by the plaintiff and his son and their families, and beat the plaintiff and his son. *Held*, that evidence was admissible to show that the son's wife was in travail, and that the defendant was informed thereof before he entered the house, though this matter of aggravation was not alleged in the declaration: *Sampson v. Henry*, 11 Pick. 379. Defendant, without provocation, assaulted plaintiff by striking him on the head with a bottle, in a public dining-room. *Held*, that a verdict of one thousand dollars would not be disturbed, although exemplary damages were therein included; that in such a case exemplary damages were properly recoverable, although no actual malice was shown: *Borland v. Barrett*, 76 Va. 128; 44 Am. Rep. 152. At the close of the trial of an action of trespass, and immediately upon the adjournment of the court thereafter, in the court-room, and in the presence of a large number of persons, one of the parties to the suit deliberately spat in the face of the other. *Held*, in an action brought by the injured party against the perpetrator of the act, that the case was a most fit one for the award of punitive damages: *Alcorn v. Mitchell*, 63 Ill. 553.

§ 1062. **Mitigation of.**—Provocation may be given in evidence in mitigation of damages,⁶ even though not suffi-

¹ *Shafer v. Smith*, 7 Har. & J. 67. In a woman's action for pointing a pistol at her when pregnant, *held*, that defendant's drunkenness was no excuse, but aggravated the assault: *Reese v. Barbee*, 61 Miss. 181.

² *Root v. Sturdivant*, 70 Iowa, 55.

³ *Shafer v. Smith*, 7 Har. & J. 67.

⁴ *Hamm v. Romine*, 98 Ind. 77; *Green v. Bedell*, 48 N. H. 546; *Corwin*

v. Walton, 18 Mo. 71; 59 Am. Dec. 285.

⁵ *Klein v. Thompson*, 19 Ohio St. 569.

⁶ *Lee v. Woolsey*, 19 Johns. 319; 10 Am. Dec. 230; *Bartram v. Stone*, 31 Conn. 159; *Corcoran v. Harran*, 55 Wis. 120. Defendant may show that plaintiff was a quarrelsome man, who, on another occasion, had assaulted defendant: *Galbraith v. Fleming*, 60 Mich. 403.

cient for justification.¹ But it must have been so recent and immediate as to raise the presumption that the violence done was committed under its influence.² So evidence that on previous occasions the plaintiff had slandered and abused him is not admissible;³ nor that the day before the plaintiff accused him of theft;⁴ nor does a libel published in the morning mitigate an assault on the libeler on the afternoon of the same day.⁵ So it is not competent, as an excuse for a battery, to prove that, several days before it was committed, plaintiff had insulted defendant's wife, or threatened defendant.⁶ The question should be, not how many hours have elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party who made the assault had a reasonable time to cool his blood.⁷ Words spoken cannot be considered in mitigation of actual damages;⁸ nor can a libel published by the plaintiff of the defendant be set up by way of counterclaim.⁹ But the defendant may show in mitigation of damages that he has already been convicted and fined for the same assault.¹⁰ Where a master in a fit of passion assaults his servant for a clear neglect of duty, the circumstances may be considered in mitigation of damages.¹¹

¹ *Brown v. Swineford*, 44 Wis. 212; 28 Am. Rep. 582.

² *Lee v. Woolsey*, 19 Johns. 319; 10 Am. Dec. 230; *Jacaway v. Dula*, 7 Yerg. 82; 27 Am. Dec. 492; *Cushman v. Rogers*, 1 Story, 91; *Castner v. Sliker*, 33 N. J. L. 95; *Waters v. Brown*, 3 A. K. Marsh. 559; *Dolan v. Fagan*, 63 Barb. 73; *Corning v. Corning*, 6 N. Y. 97; *Martin v. Minor*, 50 Miss. 42; *Bonino v. Caledonio*, 144 Mass. 299. Where an interval of two months occurred between certain declarations of the plaintiff in a suit for an assault and battery, which were offered in evidence in mitigation of damages, and the actual assault, they will be admissible, unless shown to have been communicated to the defendant only immediately before the assault: *Gaithers v. Blowers*, 11 Md. 536.

³ *Fullerton v. Warrick*, 3 Blackf. 219; 25 Am. Dec. 99.

⁴ *Jacaway v. Dula*, 7 Yerg. 82; 27 Am. Dec. 492.

⁵ *Keiser v. Smith*, 71 Ala. 481; 46 Am. Rep. 342.

⁶ *Heiser v. Loomis*, 47 Mich. 16; *Thrall v. Knapp*, 17 Iowa, 468.

⁷ *Dolan v. Fagan*, 63 Barb. 73; *Stellar v. Nellis*, 60 Barb. 524; *Stellar v. Nellis*, 42 How. Pr. 163.

⁸ *Scott v. Fleming*, 16 Ill. App. 539.

⁹ *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98.

¹⁰ *Phillip v. Kelly*, 29 Ala. 628; *Smithwick v. Ward*, 7 Jones, 64; 75 Am. Dec. 453; *Flanagan v. Womack*, 54 Tex. 45. *Contra*, *Honaker v. Howe*, 19 Gratt. 50; *Reddin v. Gates*, 52 Iowa, 210.

¹¹ *Ward v. Blackwood*, 41 Ark. 295; 48 Am. Rep. 41.

In an action for indecent assault, evidence of plaintiff's lewdness with other men is admissible in mitigation of damages.¹ But the defendant cannot show that from the intemperate habits of the other party the injury was more aggravated than it would have been upon a person of temperate habits;² nor the bad character of the plaintiff, especially where such character had no connection with the assault.³ So evidence is not admissible that the plaintiff "was a lazy vagabond, who would not work if he could help it; that money could not be made out of him by legal process; that he had been indebted to the defendant a long time, and would not pay; that the defendant, on the morning of the day on which (in the evening) the assault was committed, had offered him ten dollars per hour if he would work for him in payment of said indebtedness, and he had refused to do it";⁴ nor of the number, age, and condition of defendant's family, where the offer of the proof did not show that all the defendant's means and earnings were required to provide for their support.⁵ The facts relied on for a justification must be specially pleaded.⁶

§ 1063. **Evidence.**—Remarks made during and immediately after the assault are admissible as part of the *res gestæ*.⁷ Evidence of the pecuniary circumstances and social rank of the defendant is admissible on the question of damages.⁸ The defendant's wealth may be proved by

¹ Gulerette v. McKinley, 27 Hun, 320; Watry v. Ferber, 18 Wis. 500; 86 Am. Dec. 789.

² Littlehale v. Dix, 11 Cush. 364; Wheat v. Lowe, 7 Ala. 311.

³ McKenzie v. Allen, 3 Strob. 546.

⁴ Ward v. State, 28 Ala. 53.

⁵ Schmidt v. Pfeil, 24 Wis. 452.

⁶ Konigsberger v. Harvey, 12 Or. 286; Atkinson v. Harran, 68 Wis. 405.

⁷ Shirley v. Billings, 8 Bush, 147; 8 Am. Rep. 451; Colquitt v. State, 34 Tex. 550.

⁸ Rowe v. Moses, 9 Rich. 423; 67 Am. Dec. 560; Johnson v. Smith, 64 Me. 553; Gaither v. Blowers, 11 Md. 536; Sloan v. Edwards, 61 Md. 89;

Harris v. Marco, 16 S. C. 575; Bell v. Morrison, 27 Miss. 68; Brown v. Evans, 8 Saw. 488; Jones v. Jones, 71 Ill. 52; Barnes v. Martin, 15 Wis. 240; 82 Am. Dec. 670; Birchard v. Booth, 4 Wis. 67; Brown v. Swineford, 44 Wis. 291; 28 Am. Rep. 582; McCarthy v. Niskern, 22 Minn. 90; Heneky v. Smith, 10 Or. 349; 45 Am. Rep. 143; Dailey v. Houston, 58 Mo. 361; Gore v. Chadwick, 6 Dana, 477. Compare Cochran v. Ammon, 16 Ill. 316; McNamara v. King, 7 Ill. 432. *Contra*, Taber v. Hutson, 5 Ind. 322; 61 Am. Dec. 96; Guengerech v. Smith, 34 Iowa, 348; Hare v. Marsh, 61 Wis. 435; 50 Am. Rep. 141.

evidence of reputation.¹ So evidence is admissible on the part of the plaintiff that he was held and detained by the defendant;² of previous threats of the defendant to make the assault;³ that he complained of the injury recently after it was received;⁴ of ill-will and malice on the part of the defendant;⁵ that plaintiff was correct in the assertion, in consequence of his persistence in which the assault was made by defendant,⁶ or of obviously probable effects of a battery, though not laid in the declaration, as sickness following a beating.⁷ So evidence is admissible of previous difficulties between the parties, and threats by the plaintiff;⁸ of the turbulent and quarrelsome disposition of the plaintiff, and that this was known to the defendant;⁹ that plaintiff's witness, who joined in the assault, had been ordered by defendant not to enter the land, and that the witness, just before the assault, told a third person to wait and see some fun;¹⁰ of a permanent bodily infirmity produced or aggravated thereby, and statements made by plaintiff at various times showing his present feelings and sufferings, are admissible in evidence.¹¹ Evidence of the relationship and conduct of the plaintiff toward the defendant, and of the latter's chastity and good moral character, is admissible in an action for indecent assault.¹² Evidence of defendant's good character is inadmissible.¹³

¹ *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 143.

² *Logan v. Atustin*, 1 Stew. 476.

³ *Bartram v. Stone*, 31 Conn. 159; *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Carverno v. Jones*, 61 N. H. 623.

⁴ *Yost v. Ditch*, 5 Blackf. 184; *Werely v. Persons*, 28 N. Y. 344; 84 Am. Dec. 346.

⁵ *Aulger v. Smith*, 34 Ill. 534; *Jewett v. Banning*, 21 N. Y. 27.

⁶ *Marker v. Miller*, 9 Md. 338.

⁷ *Avery v. Ray*, 1 Mass. 12.

⁸ *Murphy v. Dart*, 42 How. Pr. 31.

⁹ *Knight v. Smythe*, 57 Vt. 529.

¹⁰ *White v. Swain*, 138 Mass. 325.

¹¹ *Johnson v. McKee*, 27 Mich. 471.

¹² *Schuek v. Hagar*, 24 Minn. 339.

¹³ *Brown v. Evans*, 8 Saw. 488; 17 Fed. Rep. 912.

TITLE XI.

FALSE ARREST AND IMPRISONMENT.

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CHAPTER LII.

FALSE ARREST AND IMPRISONMENT.

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§ 1064. **False Imprisonment — What is.** — False imprisonment consists in unlawfully restraining a person's freedom without legal authority.¹ If his freedom of locomotion is interfered with, it matters not whether he is confined in a room, or a building, or on the streets, or in the open air.² Nor is it essential that the person shall be actually taken hold of or assaulted.³ "It is the fact

¹ *Crowell v. Gleason*, 10 Me. 325; *Bird v. Jones*, 7 Q. B. 742; *Colter v. Lower*, 35 Ind. 285; 9 Am. Rep. 735; *Allen v. R. R. Co.*, L. R. 6 Q. B. 65. See note to *Mitchell v. State*, 54 Am. Dec. 258-271.

² *Floyd v. State*, 12 Ark. 43; 54 Am. Dec. 250.

³ *Grainger v. Hill*, 4 Bing. N. C. 212; *Mowry v. Chase*, 100 Mass. 79; *Ahern v. Collins*, 39 Mo. 145; *Hawk v. Ridgway*, 33 Ill. 473; *Bissell v.*

of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which, to all appearance, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit cannot be regarded as arrested until his person is touched, but when he does submit, no such necessity exists."¹ It is an imprisonment to notify a person that he is arrested, he submitting and accompanying the officer;² to stop and prevent one from passing along a highway;³ to tell one on a ferry that he cannot leave it until a certain demand is settled;⁴ or to prevent one from leaving a house or a room without being accompanied by an officer;⁵ or to call a person out to the gate of his house, and by threats make him confess that he is guilty of falsehood, and compel him to drink with his assailants;⁶ or to lay the hand on a person to arrest him, even though he is not stopped or held an instant;⁷ or to lock the door of the room, telling him he is arrested.⁸

But there must be a restriction of the right of locomotion; the party's liberty must be restrained,⁹ and the party must be aware of it.¹⁰ It is not an imprisonment to prevent a person from leaving a place by one door, there

Gold, 1 Wend. 210; 19 Am. Dec. 480; *Whithead v. Keyes*, 3 Allen, 495; 81 Am. Dec. 672; *Warner v. Riddiford*, 4 Com. B., N. S., 205; *Murphy v. Counters*, 1 Harr. (Del.) 143; *Johnson v. Tompkins*, 1 Bald. 571; *Emery v. Chesley*, 18 N. H. 198; *Pike v. Hanson*, 9 N. H. 491; *Field v. Ireland*, 21 Ala. 240; *Courtney v. Dozier*, 20 Ga. 369; *Searls v. Viets*, 2 Thomp. & C. 224; *Haskins v. Young*, 2 Dev. & B. 527; 31 Am. Dec. 426.

¹ *Brushaber v. Stegemann*, 22 Mich. 266; *Genner v. Sparks*, 1 Salk. 79. And see *Arrowsmith v. Le Mesurier*, 2 Bos. & P. 211; *Lawson v. Bergines*, 3 Harr. (Del.) 416.

² *Brushaber v. Stegemann*, 22 Mich.

266; *Wood v. Lane*, 6 Car. & P. 774.

³ *Bloomer v. State*, 3 Sneed, 66.

⁴ *Smith v. State*, 7 Humph. 43.

⁵ *Warner v. Riddiford*, 4 Com. B., N. S., 206.

⁶ *Herring v. State*, 3 Tex. App. 108.

⁷ *Whithead v. Keyes*, 3 Allen, 495; 81 Am. Dec. 672.

⁸ *Williams v. Jones*, Cas. t. Hardw. 298.

⁹ *Hart v. Flynn*, 8 Dana, 190; *French v. Bancroft*, 1 Met. 502; *Russen v. Lucas*, 1 Car. & P. 153; *Berry v. Adamson*, 6 Barn. & C. 528; *Hill v. Taylor*, 50 Mich. 549.

¹⁰ *Jones v. Jones*, 13 Ired. 448; *Herring v. Boyle*, 1 Crompt. M. & R. 377.

being another which he may use.¹ A mere delivery of a summons or citation without detention of the person is not an arrest.² The distinction between the civil action for malicious prosecution and the civil action for false imprisonment is this: in the former the arrest or imprisonment is under legal process, but the action has been commenced or carried on maliciously and without probable cause; in the latter, the arrest or imprisonment is unlawful and without legal authority, and the question of malice or probable cause is not in issue.³ An action for false imprisonment is transitory, and the courts of a state have jurisdiction of such an action brought to recover damages for an arrest under a warrant issued to enforce the collection of an illegal tax of another state.⁴

ILLUSTRATIONS.—A person went into a bank on business, and having remained after the usual hours for business, the teller closed the doors and refused to let him depart. *Held*, an imprisonment, notwithstanding the person knew the usual hours of closing the bank: *Woodward v. Washburn*, 3 Denio, 369. R., a constable, having a warrant for plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said: "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied, "for stealing pumpkins." Plaintiff started to get out of the wagon, and R. said: "You can go home and get your horses put up and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R., said, "Here's your prisoners." R. said: "You move on and I will overtake you." They went on, and R. overtook them as they got to the house of the justice. The matter was then, after discussion, adjourned to another day, without bail, and on the adjourned day the plaintiff appeared, an examination was had,

¹ *Wright v. Wilson*, 1 Ld. Raym. 739; *Bird v. Jones*, 7 Q. B. 742.

² *Huntington v. Shultz*, Harp. 452; 18 Am. Dec. 660; *Hart v. Flynn*, 8 Dana, 190.

³ *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; 54 Am. Rep. 616; *Wentz v. Bernhardt*, 37 La. Ann. 636. Although one's object in procuring an arrest was to enforce payment of a debt, an action for false imprisonment will not lie if the warrant was a lawful one.

An action for a malicious prosecution affords the remedy: *Mullen v. Brown*, 138 Mass. 114. See *Fellows v. Goodman*, 49 Mo. 62. But false imprisonment, it has been held in Massachusetts, will lie for the abuse or misuse of valid legal process: *Wood v. Graves*, 144 Mass. 365; 59 Am. Rep. 95. See *Hackett v. King*, 6 Allen, 58.

⁴ *Henry v. Sargeant*, 13 N. H. 321; 40 Am. Dec. 146.

and the justice discharged the case. *Held*, that this showed an arrest of the plaintiff: *Searls v. Viets*, 2 Thomp. & C. 224. The schooling of a boy at a boarding-school not having been paid, the master refused to allow him to return to his parents until it was paid. The boy did not know this, but supposed his detention at the school was according to the rules of the school. *Held*, no imprisonment: *Herring v. Boyle*, 1 Crompt. M. & R. 377. An officer went on board a ship to arrest a man. The ship cast off and sailed soon after, and took the officer off to sea. He had opportunity to leave before she sailed, but by his neglect did not avail himself of it. *Held*, no imprisonment: *Spoor v. Spooner*, 12 Met. 281. A procured B to assume the office of constable and arrest a boy on a charge of breaking a glass in his show-case, and the boy was carried before C, who falsely assumed to act as justice of the peace, when the form of a trial was gone through, the boy being refused the privilege of seeing an attorney, and judgment was rendered against him for three dollars, and the parties then threatened him with imprisonment in the county jail unless he could get two good men to become surety for him, which he finally procured, and was then released, after having been detained about two hours. *Held*, that all the parties were liable to an action for false imprisonment: *Price v. Bailey*, 66 Ill. 49. The gate-keepers of an elevated railroad had been ordered by the company not to allow passengers to leave the stations unless they surrendered their tickets or paid fare. A passenger on leaving the station refused to pay his fare because he had lost his ticket. The passenger was detained by the gate-keeper, turned over to a police-officer, locked up over night in the station-house, complained of, and discharged in the morning by the magistrate. *Held*, that an action of false imprisonment lay against the railroad company: *Lynch v. Metropolitan etc. R. R. Co.*, 90 N. Y. 77; 43 Am. Rep. 141. A, fined for violation of a city ordinance, was compelled to work out the fine by laboring on the streets. *Held*, that he could maintain an action for false imprisonment: *Torbert v. Lynch*, 67 Ind. 474. A locked B in a room, and by threats, with weapons in his hand, forced B to acknowledge breach of a promise of marriage, and to agree to pay damages therefor. *Held*, a false imprisonment: *Hildebrand v. McCrum*, 101 Ind. 61. A went to B's house, and found B in his corn-crib. A produced a revolver and demanded that B answer certain questions. Upon B attempting to leave the crib, A fired at and wounded him, compelling him to remain in the crib for an hour, when B procured a pistol, and A went away. *Held*, that an action for false imprisonment would lie: *McNay v. Stratton*, 9 Ill. App. 215. A sued B and caused his arrest. B tendered bail, which A knew to be sufficient, but which he

ordered the officer to refuse. *Held*, that A was liable to B in trespass on the case, and this whether he acted maliciously or not: *Gibbs v. Randlett*, 58 N. H. 407. A was arrested and threatened with imprisonment, upon a writ in a civil action, void for irregularity and the want of a proper affidavit, and was compelled to promise, and procure friends to vouch for him, that he would not abscond, and was subjected to expense in procuring an order setting aside the writ, six days after its issue. *Held*, that he could recover for this interference with his person and restraint of his liberty, although he was not actually imprisoned, and did not give the bond required by the writ, and there was no proof of express malice: *Bonesteel v. Bonesteel*, 28 Wis. 245; 30 Wis. 511.

§ 1065. Restraint without Process—When Permitted.

—In certain relations, a degree of restraint may be legally exercised by one person over another; as, for example, a parent over his child, a guardian over his ward, a master over his apprentice, a teacher over his pupil, and the master of a ship over those under his charge, both crew and passengers.¹ Another case is that of bail and principal. The authority of the bail in respect to his principal, for whose conduct he has become responsible, is to arrest and surrender him in exoneration of his liability. It is a limited authority, and must be exercised without needless violence or annoyance.² But the bail may break open the doors of the principal's house, if he refuses to surrender after notice.³

§ 1066. Imprisonment of Insane Persons.—An insane person may be arrested and detained without legal process when it is necessary to restrain him;⁴ but where the person is not dangerous, the necessity does not exist, and the right therefore does not exist.⁵ If there is probable

¹ See Division I., Persons.

² Cooley on Torts, 172; *Read v. Case*, 4 Conn. 166; 10 Am. Dec. 111; *Pease v. Burt*, 3 Day, 485.

³ *Read v. Case*, 4 Conn. 166; 10 Am. Dec. 110.

⁴ *Keleher v. Putnam*, 60 N. H. 30; 49 Am. Rep. 304.

⁵ *Keleher v. Putnam*, 60 N. H. 30; 49 Am. Rep. 304, the court saying: "The right of personal liberty is subject to some exceptions necessary to the common welfare of society. At common law, a private citizen, without warrant, may lawfully seize and detain another in certain cases. It is

cause to believe that a person is insane, and is about to commit any mischief, which, if committed by a sane person, would constitute a criminal offense, an officer may detain the offender until it may reasonably be presumed that he has changed his purpose.¹

§ 1067. **Restraint with Process—In General.**—An arrest made upon a sufficient warrant issued by a judge or court having jurisdiction is a protection to all parties acting under it.² To an action for false imprisonment it is a good defense that the process was valid and issued by a court of competent jurisdiction. One cannot recover for false imprisonment on proof of a case of malicious prosecution.³ An imprisonment, though caused by a malicious prosecution, is not “false,” unless extrajudicial or without legal process.⁴ Congress has no right to imprison a person for refusing to answer a question a committee had no right to inquire into, and the sergeant-at-

* justifiable to hold a man to restrain him from mischief. It is lawful to interfere in an affray which endangers the lives of the combatants. Other instances are enumerated in *Colby v. Jackson*, 12 N. H. 526. Under the right of self-defense, it is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others; but this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity. A dangerous maniac may be restrained temporarily until he can be safely released, or can be arrested upon legal process, or committed to the asylum under legal authority. But not every insane person is dangerous. Nothing can be more harmless than some of the milder forms of insanity. Nor is it any justification that the defendants were actuated by a desire to promote the plaintiff's welfare. The right of personal liberty is deemed

too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives these unfortunate persons the safeguards of legal proceedings and the care of responsible guardians: *Davis v. Merrill*, 47 N. H. 208; 22 Monthly L. Rep. 385; 6 South. L. Rev., N. S., 568; 3 Am. Law Rev. 193; Ray on Insanity, secs. 614-619. The legislature has established appropriate forms of proceeding for ascertaining their mental condition, imposing upon them, under the supervision of public functionaries, the restraint necessary to protect them from the imposition of others, and subjecting them to such treatment as may restore their reason.”

¹ *Pätz v. Dain*, 1 Wils. (Ind.) 150.

² *Johnson v. Maxon*, 23 Mich. 129; *Waldheim v. Sichel*, 1 Hilt. 45; *Krebs v. Thomas*, 12 Ill. App. 266; *McCarthy v. De Armit*, 99 Pa. St. 63; *Coupal v. Ward*, 106 Mass. 289.

³ *Herzog v. Graham*, 9 Lea, 152.

⁴ *Murphy v. Martin*, 58 Wis. 276.

arms is liable for the trespass.¹ A railroad company has no right to detain a person who has lost his ticket and will not pay fare.² A United States commissioner cannot fine and imprison a party.³ A commissioner in chancery cannot commit a person for refusing to testify.⁴ The arrest of a person privileged from arrest is not a trespass,⁵ and does not give an action for false imprisonment,⁶ even though the officer knew of the exemption.⁷ It is a personal privilege which may be waived by the party arrested by not asserting it at the first opportunity.⁸

§ 1068. **In Civil Cases.** — Imprisonment for debt is now practically obsolete in the United States, but the arrest of a party in a civil action is still permitted in civil cases in most of the states. The grounds upon which the arrest is allowed are generally the same, and are limited to cases where the debt was contracted or its payment is sought to be evaded by the fraud of the debtor. As, for example, where money held in a fiduciary or official capacity is converted; where a credit has been obtained and a debt made by fraud; where the debtor is about to remove from the state himself, or his property, or is concealing his property to escape payment of the debt.⁹

§ 1069. **Arresting Wrong Person.** — Where an officer has a warrant for one man and arrests another, he cannot justify under the writ for the first,¹⁰ even although the

¹ *Kilhoun v. Thompson*, 2 Morr. Trans. 56.

² *Lynch v. R. R. Co.*, 90 N. Y. 77; 43 Am. Rep. 141.

³ *Vanderpool v. State*, 34 Ark. 174. An attachment against the person for contempt, issued by the register of the court on affidavit, but without any order from the court, is invalid, and is no justification in an action for false imprisonment: *Thompson v. Ellsworth*, 39 Mich. 719.

⁴ *Marsh v. Williams*, 1 How. (Miss.) 132.

⁵ *Chase v. Fish*, 16 Me. 136; *Wood*

v. Kinsman, 5 Vt. 588; *Cameron v. Lightfoot*, 2 W. Black. 1190; *Brown v. Getchell*, 11 Mass. 11; *Cable v. Cooper*, 15 Johns. 152; *Deo v. Van Valkenburgh*, 5 Hill, 242; *Blight v. Fisher*, Pet. C. C. 41; *Waterman v. Mersitt*, 7 R. I. 345.

⁶ *Smith v. Jones*, 76 Me. 138; 49 Am. Rep. 598.

⁷ *Magnay v. Burt*, 5 Q. B. 381.

⁸ *Dow v. Smith*, 7 Vt. 465; 29 Am. Dec. 202.

⁹ See Cal. Civ. Code, sec. 479.

¹⁰ *Mead v. Haws*, 7 Cow. 332; *Miller v. Foley*, 28 Barb. 630; *Scott v. Ely*,

first was the one against whom the warrant was intended to be issued.¹ But the arrest is valid if the party led the officer by his statements to believe himself the one described in the writ.² An officer arresting a supposed felon without a warrant, but arresting the wrong man, is not liable if he acted in good faith and upon reasonable grounds of suspicion.³

ILLUSTRATIONS. — A was arrested through the agency of a detective agency employed by a railroad company without a warrant and under a mistake, he not being the person sought. *Held*, that A had a right of action against the company: *Harris v. R. R. Co.*, 35 Fed. Rep. 116. A sheriff was requested by the authorities of another county to arrest a certain person there indicted for murder. The sheriff, without a warrant, went into another county than his own, and arrested the wrong person. *Held*, that an action for false imprisonment would lie against the sheriff: *Mitchell v. Malone*, 77 Ga. 301. Charles F. Moore was arrested on a *capias* from another county for the arrest of Charley Moore, for theft. Plaintiff testified that he protested his innocence, and warned the sheriff that he should seek redress. When taken to the other county, he was not identified as the person desired. *Held*, to sustain a judgment for false imprisonment: *Ryburn v. Moore*, Tex., 1889.

§ 1070. **Restraint with Process — Void Process.** — Process void because not emanating from the officer or court from which it purports to come is of no protection.⁴ Nor is process which is void because the court has no jurisdiction to issue it; as where a justice issues a warrant of

4 Wend. 555; *Griswold v. Sedgwick*, 1 Wend. 126; *McMahan v. Green*, 34 Vt. 70; 80 Am. Dec. 665; *Shadgett v. Clipson*, 8 East, 328; *Dunston v. Paterson*, 2 Com. B., N. S. 495; *Hoye v. Bush*, 1 Man. & G. 784; *Hays v. Creary*, 60 Tex. 445; *Formwalt v. Hylton*, 66 Tex. 288.

¹ *Hoye v. Bush*, 1 Man. & G. 784.

² *Dunston v. Paterson*, 2 Com. B., N. S., 495.

³ *Eanes v. State*, 6 Humph. 53; 44 Am. Dec. 289; *Formwalt v. Hylton*, 66 Tex. 288.

⁴ *Cooley on Torts*, 173; *Pierce v. Hubbard*, 10 Johns. 405; *Rafferty v.*

People, 69 Ill. 111; 72 Ill. 37; 18 Am. Rep. 601; *Haskins v. Young*, 2 Dev. & B. 527; 31 Am. Dec. 426; *Painter v. Ives*, 4 Neb. 122; *Hallock v. Dominy*, 7 Hun. 52. A warrant void on its face is no defense to one on whose complaint the warrant was issued: *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; 54 Am. Rep. 616. One who is arrested without reason, and kept in defiance of offers to give bail and to sue out a writ of *habeas corpus*, may maintain against all concerned an action for false imprisonment: *Manning v. Mitchell*, 73 Ga. 660.

arrest without the oath required by statute,¹ or without a complaint,² or an execution renewing an execution without signing it,³ or a warrant not describing the person.⁴ Process void because the officer issuing it had no jurisdiction is no protection, and all the parties who have procured or acted upon it are liable for a false imprisonment.⁵ But where the jurisdiction depends not on matter of law, but on matter of fact which the court or magistrate is to pass upon, the decision upon it is conclusive, and a protection, not only to the officer serving the process, but to the court or magistrate also.⁶ Where the sufficiency of the facts stated in an application for an order of arrest is passed upon by the judge making the order, the plaintiff is not responsible, unless he omitted something that he should have averred.⁷ An action for false imprisonment cannot be maintained against a town, its mayor, marshal, or deputy marshal, by one who has been arrested for a violation of a town ordinance, though the town council had no power to pass the ordinance.⁸ If a prisoner be brought on *habeas corpus* issued by a judge who has not jurisdiction in such case, and remanded, this is not a false imprisonment. The proceedings on *habeas corpus* being void, the imprisonment may be referred to the original warrant.⁹

ILLUSTRATIONS.—Blank warrants signed by a magistrate were left in the hands of a police-sergeant who was accustomed to fill them up with the name of the person to be arrested, etc., and use them as occasion demanded. Upon a warrant so filled up by the sergeant, a police-officer undertook to arrest the person whose name was inserted therein, but was resisted and

¹ Bissell v. Gold, 1 Wend. 210; 19 Am. Dec. 480.

² Wilcox v. Williamson, 61 Miss. 310.

³ Barhydt v. Valk, 12 Wend. 145; 27 Am. Dec. 124.

⁴ Jones v. Leonard, 50 Iowa, 106; 32 Am. Rep. 116.

⁵ Poulk v. Slocum, 3 Blackf. 421.

⁶ Brittain v. Kinnaird, 1 Brod. & B. 432; Mather v. Hood, 8 Johns. 44;

Mackaboy v. Commonwealth, 2 Va. Cas. 268; Clarke v. May, 2 Gray, 410; 61 Am. Dec. 470; State v. Scott, 1 Bailey, 294; Wall v. Trumbull, 16 Mich. 228; Sheldon v. Wright, 5 N. Y. 497.

⁷ Dusy v. Helm, 59 Cal. 188.

⁸ Trammell v. Russellville, 34 Ark. 105; 36 Am. Rep. 1.

⁹ State v. Guest, 6 Ala. 778.

killed by such person. *Held*, that the warrant was a nullity, and such killing was manslaughter, and not murder: *Rafferty v. People*, 69 Ill. 111; 18 Am. Rep. 601. A was imprisoned for violating an injunction granted by the probate court without the undertaking required by law. *Held*, that the judgment was invalid, and that, in an action for false imprisonment, malice and want of probable cause need not be alleged: *Diehl v. Friester*, 37 Ohio St. 473. A police-court justice ordered a man complained of for evading payment of fare on a railroad to find bail for his appearance before the supreme judicial court. Failing to find bail, he was committed, and obtained his release on *habeas corpus*. *Held*, that the marshal and chief of police who directed by a subordinate the execution of the *mittimus* could not, when sued for false imprisonment, justify under a process so clearly on its face in excess of jurisdiction: *Pooler v. Reed*, 75 Me. 488. Plaintiff sued a mayor for false imprisonment in having caused plaintiff's arrest without an affidavit. *Held*, that if plaintiff waived the affidavit, this constituted a sufficient defense: *Williamson v. Wilcox*, 63 Miss. 335.

§ 1071. **Defective Process.**—Where the process is not void, but merely irregular, it is a protection to those acting under it.¹ An officer who arrests and imprisons one by virtue of a warrant is justified, although every fact necessary to constitute the offense is not set forth.² Where the governor of one state demands a person of the governor of another state as a fugitive from justice, and the governor of the latter state causes the accused to be arrested and delivered to the person appointed for that purpose by the governor making the demand, such person is not liable for a false imprisonment by reason of any irregularity in the warrant of arrest.³ If the warrant was issued on testimony showing the obtaining of goods by a lie, and under the pretense of a contract, the action for false imprisonment is not maintainable, even though technically there could not be a conviction for false pre-

¹ *Reynolds v. Corp*, 3 Caines, 267; *Johnson v. Maxon*, 23 Mich. 127; *Cooper v. Adams*, 2 Blackf. 294; *Chapman v. Dyett*, 11 Wend. 31; 25 Am. Dec. 399; *Dominick v. Eacker*, 3 Barb. 19; *Roth v. Schloss*, 6 Barb. 308; *Bocock* 311, *v. Cochran*, 32 Hun, 521; *Marks v. Townsend*, 97 N. Y. 590; *Wagstaff v. Schippel*, 27 Kan. 450. ² *Collins v. Brackett*, 34 Minn. 339. ³ *Johnston v. Vanamringe*, 5 Blackf.

tenses or embezzlement.¹ An action for false imprisonment will not lie against one who has made a criminal complaint, or against his attorney, in a case where the warrant issued thereon is sufficiently regular on its face to protect the officer executing it.² But the officer is bound to know the law, and that his writ is bad on its face, if such is the fact.³ If a person arrested without a warrant consents to his discharge without a complaint being made against him, intending thereby to release any damages on account of a failure to make the complaint, and such agreement is fairly and intelligently made, he cannot maintain an action against the officer for an assault and false imprisonment.⁴

§ 1072. **Arrest by Military Orders.**—The acts of military authorities in time of war in arresting and imprisoning persons do not, as a rule, give any right of action in the civil courts.⁵ But for a malicious act in time of peace, even of lawful authority, or in excess of authority, a military officer may be made liable.⁶

ILLUSTRATIONS. — A sergeant in garrison and on duty, adjoining an incorporated city, arrested a citizen of Texas with his military guard, while he was outside the garrison-grounds, standing in a street of the city, and with fixed bayonets escorted him to the garrison for using insulting words to the sergeant. *Held*, that the sergeant, being charged by the laws of the United States with the good order and discipline of the fort, was justified in going out of the fort to remove the citizen and abate the nuisance caused by his abusive language: *Oglesby v. State*, 39 Tex. 53.

¹ Neall *v.* Hart, 115 Pa. St. 347.

² Wheaton *v.* Beecher, 49 Mich. 348; Fischer *v.* Langbein, 13 Abb. N. C. 10.

³ Grumon *v.* Raymond, 1 Conn. 39; 6 Am. Dec. 200; Lewis *v.* Avery, 8 Vt. 287; 30 Am. Dec. 469; Clayton *v.* Scott, 45 Vt. 386; Barhydt *v.* Valk, 12 Wend. 145; 27 Am. Dec. 124.

⁴ Caffrey *v.* Drugan, 144 Mass. 294.

⁵ Teagarden *v.* Graham, 31 Ind. 422; Oglesby *v.* State, 39 Tex. 53;

Clow *v.* Wright, Brayt. 118. And see Merriam *v.* Bryant, 14 Conn. 200. As to acts of the military authorities of the Confederate States, see French *v.* White, 4 W. Va. 170; Caperton *v.* Martin, 4 W. Va. 138; 6 Am. Rep. 270; Caperton *v.* Nickel, 4 W. Va. 173; Caperton *v.* Bowyer, 4 W. Va. 176; Caperton *v.* Ballard, 4 W. Va. 420.

⁶ Tyler *v.* Pomeroy, 8 Allen, 480; McCall *v.* McDowell, 1 Abb. 212; Wilson *v.* McKenzie, 7 Hill, 95; 43 Am. Dec. 51.

§ 1073. **Arrest without Warrant — By Officer.** — A constable or other peace-officer has power to arrest without a warrant where he sees a felony committed, or he has reasonable grounds to believe a felony has been committed.¹ He is not bound to first procure a warrant, even where there is no reason to fear the escape of the prisoner in consequence of the delay.² He may arrest without a warrant, upon satisfactory reasons for belief that a crime has been committed, that the suspected party is guilty, and that he would escape by the delay in obtaining a warrant.³ He may arrest without warrant in cases in his view of breaches of the peace, affrays, riots,⁴ or drunken and disorderly persons, vagrants, and street-walkers.⁵ A policeman may, without a warrant, arrest one for injuring sheep in a railroad cattle-yard, and such arrest may be made on Sunday.⁶ He may arrest to prevent a threatened breach of the peace.⁷ But arrests without process to prevent threatened breaches of the peace are not justified unless the breach has proceeded far enough to sustain proceedings against the person committing it, without reference to past similar offenses which he may have committed before the officer arrived.⁸ A statute providing that "any officer, upon view of any crime," etc., may arrest without warrant imports his right to arrest upon view of such acts as show a reasonable ground of arrest; also the right to take from the offender any tools or

¹ Cooley on Torts, 175; Samuel v. Payne, 1 Doug. (Mich.) 358; Davis v. Russell, 5 Bing. 354; Beckwith v. Philby, 6 Barn. & C. 635; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702; Rohan v. Swain, 5 Cush. 281; Doering v. State, 49 Ind. 56; 19 Am. Rep. 669; Shanley v. Wells, 71 Ill. 78; State v. Sims, 16 S. C. 486; State v. Underwood, 75 Mo. 230.

² Wade v. Chaffee, 8 R. I. 224; 5 Am. Rep. 572.

³ Neal v. Joyner, 89 N. C. 287.

⁴ Respublica v. Montgomery, 1 Yeates, 419; City Council v. Payne, 2 Nott & McC. 475; State v. Brown, 5

Harr. (Del.) 505; Phillips v. Trull, 11 Johns. 487; Vandever v. Mattocks, 3 Ind. 479; Boyleston v. Kerr, 2 Daly, 220; Sternack v. Brooks, 7 Daly, 142; State v. Crocker, 1 Houst. Crim. Cas. 434; State v. Bacon, 17 S. C. 58; Wiltse v. Holt, 95 Ind. 469.

⁵ Commonwealth v. Tobin, 108 Mass. 426; 11 Am. Rep. 375; Mills v. Weston, 60 Ill. 362; Roberts v. State, 14 Mo. 138; 55 Am. Dec. 97; but see In re Way, 41 Mich. 299.

⁶ Corbett v. Sullivan, 54 Vt. 619.

⁷ Hayes v. Mitchell, 80 Ala. 183.

⁸ Quinn v. Heisel, 40 Mich. 576.

weapons available for escape, or means to procure the same, and hold them till they can safely be returned.¹

But an officer has no power to arrest a person without a warrant on suspicion of having committed a misdemeanor,² or an offense, like petty larceny, punishable by fine and imprisonment in jail.³ It is essential that within a reasonable time the party arrested be taken before a magistrate for examination.⁴ In an action for false arrest and imprisonment of the plaintiff on an alleged suspicion of his being an escaped convict, it is for the jury to determine whether the detention was for an unreasonable time.⁵ Although no express authority is conferred by statute, one arrested under a peace-warrant and brought before a justice late Saturday night, crazed with drink, is properly committed over Sunday in default of bail.⁶ An arrest by a constable out of his jurisdiction is an arrest without a warrant, even though he may have a warrant which commanded the arrest within his jurisdiction.⁷ In a Michigan case, a city marshal arrested a man on Saturday evening on the strength of a letter purporting to come from the chief of police of a city in another state, and signed with his name by some person whose initials only were attached. The letter stated nothing that would constitute a criminal offense in Michigan, but the marshal detained the prisoner as a matter of "official courtesy." The supreme court held that the arrest was illegal, and the officer liable for false imprisonment.⁸

¹ O'Connor v. Bucklin, 59 N. H. 589.

² Griffin v. Coleman, 4 Hurl. & N. 265; Bowditch v. Balchin, 5 Ex. 380; Newton v. Locklin, 77 Ill. 103; Boyleston v. Kerr, 2 Daly, 220; State v. Crocker, 1 Houst. Cr. Cas. 434; People v. Pratt, 22 Hun, 300; Philadelphia v. Campbell, 11 Phila. 163; People v. Haley, 48 Mich. 495.

³ Bright v. Patton, 5 Mackey, 534; 60 Ark. Rep. 369.

⁴ Harris v. Atlanta, 62 Ga. 291; Cochran v. Toher, 14 Minn. 388; Brock v.

Stimson, 108 Mass. 520; 11 Am. Rep. 309; Johnson v. Americus, 46 Ga. 80; Hayes v. Mitchell, 67 Ala. 452; Touhey v. King, 9 Lea, 422.

⁵ Harris v. Atlanta, 62 Ga. 290.

⁶ Pepper v. Mayes, 81 Ky. 674.

⁷ Krug v. Ward, 77 Ill. 603; Ledbetter v. State, 23 Tex. App. 247.

⁸ Malcolmson v. Scott, 56 Mich. 459. The court said: "The habit, which is by a very singular abuse of language called official courtesy, of making illegal arrests in one jurisdiction in the hope that similar violations of law

ILLUSTRATIONS. — The plaintiff, in a frequented public street, called defendant, a police-officer, in a loud and boisterous manner, offensive and indecent names, whereupon the defendant arrested plaintiff. In an action for assault and battery and false imprisonment, *held*, that the plaintiff was guilty of a breach of the peace, and that an arrest without warrant was lawful: *Davis v. Burgess*, 54 Mich. 514; 52 Am. Rep. 828. The plaintiff fraudulently substituted a check given at a restaurant for a meal for one of a smaller amount, and paid the smaller amount. He was subsequently complained of to a constable, who arrested him without a warrant. *Held*, that the constable was not justified: *Boyleston v. Kerr*, 2 Daly, 220. A peace-officer, without a warrant, arrested plaintiff five hours after he had been guilty of disorderly conduct. *Held*, that an action for false imprisonment would lie: *Wahl v. Walton*, 30 Minn. 506. A member of a city government contracted with the city to renew a bridge, but after collecting the materials at the place he was notified by the city authorities, contending they were unsuitable, not to remove the old bridge or proceed with the work. Not desisting, he was arrested by the city marshal, committed to jail until a warrant could be procured, and taken before the municipal court on a charge of obstructing the highway. *Held*, that the contract not having been declared void by the authorities, the arrest and imprisonment were unjustifiable: *Moore v. Durgin*, 68 Me. 148. An officer arrested a woman and took her to the station on no other justification than that of vague hearsay and suspicion of a third person that she had had something to do with making way with a missing person, the officer himself making no inquiry whatever into the facts. *Held*, that the arrest was unwarranted: *Somerville v. Richards*, 37 Mich. 299. Plaintiff being drunk and disorderly in a public place, defendant, a police-officer, arrested him without a warrant, as directed

may be reciprocated, is one which cannot be tolerated. The law places private liberty at a much higher value than official favors; and violations of law by those who are appointed to protect, instead of destroy, private security deserve no favor. Fundamental rules of constitutional immunity cannot be relaxed. . . . The extradition of criminals who are claimed to be fugitives from other states is governed entirely by the constitution and laws of the United States. No state can deal with other states, under the express terms of the constitution, without the approval of Congress, and what the state cannot do its policemen cannot do. An arrest

here without compliance with the United States laws cannot be maintained. Michigan cannot treat foreign offenses as domestic, and there is nothing in our statutes which contemplates an arrest without warrant for purposes of extradition. Under the constitution and acts of Congress, it is for the governor of the one state to determine whether he desires extradition, and for the governor of the other to decide whether he will grant it. Congress will not allow the demand to be made until the offender has either been indicted, or otherwise complained of in the regular course of justice. There can be no demand before complaint."

by a statute for such case provided, and which also directed that the offender be taken before a magistrate. Defendant kept plaintiff in custody for an hour, and discharged him without taking him before a magistrate. *Held*, that the defendant was liable for an assault and false imprisonment: *Brock v. Stimson*, 103 Mass. 520; 11 Am. Rep. 390. One was arrested at 5:30, P. M., by a police-officer, for riding his horse on the sidewalk of a street in the city of Brooklyn, in presence of the officer. He was carried to the station-house, and there by the captain and sergeant confined in a cell until morning. *Held*, that this was only a misdemeanor; that the duty of the policeman was to have carried the arrested man before a magistrate immediately; that the detention was unlawful, and would sustain a suit for damages by the party arrested against the officers: *Schneider v. McLane*, 33 Barb. 495. The plaintiff was arrested without a warrant, was detained five days without having ever been taken before a magistrate, although there was nothing to prevent this being done, and at the end of the five days was discharged and released without any legal proceeding whatever having been taken. *Held*, that the time of detention was unreasonable as a matter of law: *Cochran v. Toher*, 14 Minn. 385. The plaintiff was arrested without any warrant, while peaceably passing along the streets, on the charge of having been in a state of intoxication on the streets in the morning or middle of the same day, though he was sober at the time of the arrest, and was forcibly taken before a police-magistrate without any authority being shown, though demanded, and when brought before the magistrate, then engaged in other business, he was (unlawfully) committed to the calaboose for abusive language to the magistrate, where he was detained overnight. *Held*, that he was entitled to recover: *Newton v. Locklin*, 77 Ill. 103.

§ 1074. **By Private Person.** — All persons whatever who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders.¹ So any person whatever, if an affray be made to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace;² but after there is an end of the

¹ 3 Hawk. P. C. 157; *Handcock v. Baker*, 2 Bos. & P. 260.

² *Baynes v. Brewster*, 2 Q. B. 375; *Price v. Seeley*, 10 Clark & F. 39. A private person may arrest one for a misdemeanor without suing out a war-

rant or calling an officer. In Illinois it was so held, in the case of boys unlawfully taking a horse from the place where the owner had left him: *Smith v. Donnelly*, 66 Ill. 464.

affray, they cannot be arrested without a warrant.' A private person may, also, in a case of strong suspicion, arrest for a felony not committed in his presence,² provided the felony was actually committed.³ The duty of a person causing an arrest to have the party conveyed without delay before the most convenient officer authorized to issue a warrant is not discharged by delivering him to a police-officer. The imprisonment would not be legal beyond a reasonable time for procuring a warrant.⁴ So a private person is bound to give his aid to an officer apprehending an offender, and is not civilly liable for doing so;⁵ nor is he called upon to examine the officer's authority.⁶ But where a party making an arrest is not a known public officer, but assumes to act by special appointment, persons aiding him are bound to know whether he is authorized to make the arrest; and if he is a trespasser for want of authority, they are also trespassers.⁷ Where an officer who is present at the commission of an offense, or on hue and cry, is not able to make an arrest, and calls in other officers, or the *posse*, their justification is as broad as his own.⁸ A person acting in aid of an officer in making an arrest is justified in using such force as may be necessary to overcome the

¹ Phillips v. Trull, 11 Johns. 486.

² Holley v. Mix, 3 Wend. 354; 20 Am. Dec. 702; Reuck v. McGregor, 32 N. J. L. 70; Allen v. Wtight, 8 Car. & P. 522; Brockway v. Crawford, 3 Jones, 433; 67 Am. Dec. 250; Teagarden v. Graham, 31 Ind. 422; Ryan v. Donnelly, 71 Ill. 100; Allen v. Leonard, 28 Iowa, 529; Lauder v. Miles, 3 Or. 35.

³ Id.; Burns v. Erben, 40 N.Y. 466; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 602; the court saying: "My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If any innocent person is arrested upon suspicion by a private individual, such individual is excused

if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another, which he had reason to rely on. These principles will be found substantially in 1 Chitty's Criminal Law, 15.

⁴ Ocean S. S. Co. v. Williams, 69 Ga. 251.

⁵ Coyles v. Hurtin, 10 Johns. 85.

⁶ Main v. McCarty, 15 Ill. 441; McMahan v. Green, 34 Vt. 69; 80 Am. Dec. 665; but see Mitchell v. State, 12 Ark. 50; 54 Am. Dec. 253.

⁷ Dietrichs v. Schaw, 43 Ind. 175.

⁸ Main v. McCarty, 15 Ill. 441.

resistance offered, if he uses more, he becomes a trespasser, and must, if led astray, in the opinion of the jury, by his own judgment, be responsible for the consequences.¹ Where the sheriff is endeavoring to make an arrest, or preserve the peace, and has commanded others to assist him, he is, although absent in some other place, if such absence be for the purpose of furthering the design, to be deemed constructively present, so as to justify his assistants.² A sheriff's keeper, rightfully in A's shop, may not be arrested by A without a warrant, although A has reasonable cause to believe that the keeper has stolen money, unless by an improper omission to disclose his business in the shop the keeper contributes to induce such belief.³

ILLUSTRATIONS. — A notary public of a certain county, who acted also as justice of the peace, authorized a special constable to execute a warrant in said county by his indorsement on the warrant, signed by him as "notary public." *Held*, that his failure to add "*ex officio* justice of the peace" was no excuse for a party who refused to aid said constable in making an arrest, as said party was bound to know that he was a justice: *Coleman v. State*, 63 Ala. 93. The mayor of a city was in a bar-room late one night, drinking, singing, and dancing, when a fight became imminent, and the mayor ordered one of the parties present to jail. *Held*, that an action for false imprisonment would not lie: *Johnston v. Moorman*, 80 Va. 131.

§ 1075. **Who Liable for — Officer Issuing Process.** — A judge or other officer issuing process beyond his jurisdiction is civilly liable in damages.⁴ A justice is liable who commits a person brought before him without previous complaint or information;⁵ or who commits without jurisdiction;⁶ or who issues a warrant on a complaint void on its face as showing that the larceny charged was

¹ *Murdock v. Ripley*, 35 Me. 472.

² *Coyles v. Hurin*, 10 Johns. 85.

³ *Morley v. Chase*, 143 Mass. 396.

⁴ *Bigelow v. Stearns*, 19 Johns. 39;
10 Am. Dec. 189.

⁵ *Tracy v. Williams*, 4 Conn. 107; 10 Am. Dec. 102; *Prell v. McDonald*, 7 Kan. 426; 12 Am. Rep. 423.

⁶ *Sthreshley v. Fisher*, Hardin, 249; *Comfort v. Fulton*, 13 Abb. Pr. 276.

barred by the statute of limitations.¹ In Massachusetts, a justice of the peace who issues a warrant for the arrest of a person under an unconstitutional statute is liable for false imprisonment.² Where a justice of the peace having the power to commit for contempt, as in Minnesota, commits a person for contempt, and on his being liberated on *habeas corpus* recommitts him on a fresh warrant for the same offense, such justice is not amenable to a civil action for false and malicious imprisonment, though his action in making the second commitment was erroneous, and although it is alleged that he acted maliciously.³

§ 1076. **Party Causing Arrest.** — A person causing the arrest of a person on a void process is civilly liable in damages.⁴ So also where he procures the arrest of a person without just cause;⁵ or where it is not warranted by law.⁶ So where the warrant is legal, but the object is illegal, as to extort money, or the payment of a civil claim.⁷ Where the defendant has sufficient real property to satisfy a judgment recovered against him, trespass will lie against the judgment creditor who sues out a writ of *capias ad satisfaciendum*, under which the debtor is imprisoned, although such writ will be a justification to the officer executing it.⁸ A private person is liable in damages for a wrongful arrest or imprisonment directed or authorized by him.⁹ One who procures an illegal arrest to be made is liable for false imprisonment, though not present aiding and abetting.¹⁰ Attendance at the trial and proceed-

¹ Vaughn v. Congdon, 56 Vt. 111; 48 Am. Rep. 758.

² Kelly v. Bemis, 4 Gray, 83; 64 Am. Dec. 50; Barker v. Stetson, 7 Gray, 54; 66 Am. Dec. 457. *Contra*, Henke v. McCord, 55 Iowa, 378.

³ Cooke v. Bangs, 31 Fed Rep. 640.

⁴ Luddington v. Peck, 2 Conn. 700; Bauer v. Clay, 8 Kan. 550; Allen v. Greenlee, 2 Dev. 370; Thorpe v. Wray, 68 Ga. 359. As to liability of attorneys, see Division I., Attorneys.

⁵ Baird v. Householder, 32 Pa. St. 168; Sullivan v. Jones, 2 Gray, 570.

⁶ Curry v. Pringle, 11 Johns. 444; Green v. Ramsey, 2 Wend. 611; Sleight v. Leavenworth, 5 Duer, 122.

⁷ Hackett v. King, 6 Allen, 58.

⁸ Allison v. Rheam, 3 Serg. & R. 137; 8 Am. Dec. 644.

⁹ McGarrahan v. Lavers, 15 R. I. 302.

¹⁰ Clifton v. Grayson, 2 Stew. 412; Floyd v. State, 12 Ark. 435; 4

ing with the action after knowledge of the arrest will make the party liable therefor.' But if one does nothing more than to make a complaint to a magistrate against another for an offense, and the latter is arrested under a warrant duly issued by the magistrate who has jurisdiction of the subject-matter and of the party, the complainant is not liable to an action of false imprisonment, although the complaint is defective.² One who has procured an order for A's arrest in a civil suit is not liable for the act of the sheriff in arresting B by mistake, he being pointed out as A by a clerk of the attorney of the party procuring the order.³ A party cannot protect himself from the consequences of an unlawful arrest by offering as a defense the order of a superior officer.⁴ The fact that a person prefers a criminal charge against another before a justice of the peace, and is a witness upon the trial of the accused, and employs counsel to conduct the trial on the part of the people, will not render him liable, in an action for assault and battery and false imprisonment, for the consequences of an erroneous conviction by the justice, where there is nothing to connect him with the unlawful imprisonment.⁵

ILLUSTRATIONS. — An attorney and two others reported to a police-officer that a forgery and larceny had been committed by plaintiff, and it being too late at night to get a warrant, the officer arrested plaintiff without one, the three persons aforesaid going with the officer to the house wherein plaintiff was arrested, and remaining outside while the officer went in and made the arrest. *Held*, that an action against the three for false imprisonment could not be maintained: *Benham v. Vernon*, 5 Mackey, 18. Defendant, the consul-general of Spain, was ordered by telegraph to procure the arrest and extradition of plaintiff for forgery. Plaintiff was at the time in New York, but was on the

Am. Dec. 250; *Stoddard v. Bird*, Kirby, 65; *Burlingham v. Wylee*, 2 Root, 152; *Stoyel v. Lawrence*, 3 Day, 1; *Cooper v. Johnson*, 81 Mo. 483.

¹ *Bissell v. Gold*, 1 Wend. 210; 19 Am. Dec. 480.

² *Langford v. R. R. Co.*, 144 Mass. 431; *Murphy v. Walters*, 34 Mich. 180.

³ *Gearon v. Savings Bank*, 50 N. Y. Sup. Ct. 264.

⁴ *Swart v. Kimball*, 43 Mich. 443.

⁵ *Peckham v. Tomlinson*, 6 Barb. 253.

eve of leaving for Canada. The date of the forgery was not stated in the dispatches, but defendant supposed the offense to have been recent, and to have been committed since the ratification of the treaty of 1877. He procured plaintiff's arrest accordingly. The crime, in fact, was committed before 1877, so that plaintiff could not be held. *Held*, that there being probable cause, and no malice, plaintiff's action for false imprisonment and malicious prosecution could not be maintained: *Castro v. DeUriarte*, 16 Fed. Rep. 93. The president of an electric-light company caused plaintiff's arrest without a warrant for cutting down a pole erected against his protest, and without right, in a lawn in front of plaintiff's house. Plaintiff was locked up overnight, then taken into court, and soon discharged. *Held*, that an action for false imprisonment was maintainable: *Ross v. Leggett*, 61 Mich. 445. Two police-officers wrongfully arrested A without a warrant, and placed him in the lock-up. The city marshal, perceiving that the arrest was without cause, sent him to the railroad station under the custody of an officer, the assistant marshal taking part, where he was released when on board the train. *Held*, that the five officers were jointly liable for the imprisonment between the lock-up and the train: *Bath v. Metcalf*, 145 Mass. 274. The owner of a pleasure resort placed his son in charge as manager, and engaged special police. The son and the captain of these police arrested the ticket-seller at the place on a false charge of larceny. *Held*, that the ticket-seller had a right of action against the owner: *Clark v. Starin*, 47 Hun, 345. Defendant directed the attention of a police-officer to the acts of plaintiff, constituting, as he supposed, a violation of a city hack ordinance, and committed in the presence of the officer. *Held*, that he was not liable for false imprisonment on the arrest of the plaintiff, although the charge might not have been well founded: *Veneman v. Jones*, 118 Ind. 41.

§ 1077. **Damages.**—The plaintiff is entitled to more than nominal damages even without proof of special damage;¹ and exemplary damages will be given where the

¹ Page v. Mitchell, 13 Mich. 63; 86 Am. Dec. 75; Josselyn v. McAllister, 22 Mich. 300. Where there was no actual malice, and plaintiff, who had neither property nor business, was imprisoned from Friday to Monday, \$475 was excessive: Ogg v. Murdock, 25 W. Va. 139. Arrest and detention for three hours in the lock-up, with no circumstances of special in-

dignity, does not justify a verdict for \$2,917: Woodward v. Glidden, 33 Minn. 103. Plaintiff having been for a second time arrested and imprisoned without lawful authority, taken away from her home and family, and incarcerated in a filthy cell, with her nursing infant, a verdict of one thousand dollars was not excessive: Fenelon v. Butts, 53 Wis. 344. For false im-

arrest was malicious, or with a bad motive.¹ If one, in ignorance of law, causes the unlawful arrest of another, the offense is not the same, and the liability not so great, as though the arrest were known to be unlawful, and caused in defiance of law.² On the question of the measure of damages, evidence of prospective damages is relevant;³ or that the plaintiff lost his situation thereby;⁴ or that the officer was drunk;⁵ or that a plea of justification was made, but not sustained;⁶ but not the bad treatment of the plaintiff by the officers who arrested him.⁷ The plaintiff's costs and expenses in the suit in which he was arrested are recoverable.⁸ In mitigation of exemplary damages, evidence is admissible that the defendant acted with probable cause, or without malice;⁹ as, that the justice who is sued erred in his opinion of his jurisdiction;¹⁰ or an officer acted under military orders.¹¹ So in mitigation of exemplary damages, the facts and circumstances of the arrest may be shown;¹² or the circumstances under which the affidavit of arrest was made.¹³ The jury are the judges of the amount of damages to be given, and

prisonment on board a vessel, one hundred dollars was a sufficient remuneration for the personal annoyance, no loss resulting: *Young v. Rossi*, 30 Fed. Rep. 231.

¹ *McCall v. McDowell*, 1 Abb. U. S. C. C. 212; *Hamlin v. Spaulding*, 27 Wis. 360; *Brushaber v. Stegemann*, 22 Mich. 266; *Wiley v. Keokuk*, 6 Kan. 94; *Hall v. O'Malley*, 49 Tex. 70; *Whitmore v. Allen*, 33 Tex. 355; *Brown v. Chadsey*, 39 Barb. 253; *Marsh v. Smith*, 49 Ill. 396.

² *Hill v. Taylor*, 50 Mich. 549.

³ *Thompson v. Ellsworth*, 39 Mich. 719.

⁴ *American Exchange Co. v. Patterson*, 73 Ind. 438. He may recover not only for damages up to the time of the suit, but also for his time lost after the suit, if by the arrest he failed to get the work he otherwise would have obtained: *Thompson v. Ellsworth*, 39 Mich. 719.

⁵ *Hall v. O'Malley*, 49 Tex. 70.

⁶ *Ocean Steamship Co. v. Williams*, 69 Ga. 251.

⁷ *Murdock v. R. R. Co.*, 133 Mass. 15; 43 Am. Rep. 480. *Contra*, *Abrahams v. Cooper*, 81 Pa. St. 232.

⁸ *King v. Ward*, 77 Ill. 603; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Ocean Steamship Co. v. Williams*, 69 Ga. 251. *Contra*, *Gibbs v. Rundlett*, 58 N. H. 407; *Strang v. Whitehead*, 12 Wend. 64.

⁹ *Comer v. Knowles*, 17 Kan. 436; *Miller v. Grice*, 2 Rich. 27; 44 Am. Dec. 271; *Livingston v. Burroughs*, 33 Mich. 511; *Sleight v. Ogle*, 4 E. D. Smith, 445; *Sugg v. Pool*, 2 Stew. & P. 196; *McCall v. McDowell*, 1 Abb. U. S. C. C. 212; *Beckwith v. Bean*, 98 U. S. 266; *Ryers v. Wilson*, Minor, 407. But not as to actual damages: *Comer v. Knowles*, 17 Kan. 436.

¹⁰ *Miller v. Grice*, 2 Rich. 27; 44 Am. Dec. 271.

¹¹ *Carpenter v. Parker*, 23 Iowa, 450.

¹² *Johnson v. Von Kettler*, 66 Ill. 63.

¹³ *Roth v. Smith*, 41 Ill. 314.

their verdict, though large, will not be interfered with by the court,¹ unless it was the result of passion or prejudice.²

§ 1078. **Evidence.**—The bad character of the plaintiff may be given in evidence,³ but the plaintiff (unless it is put in issue by the pleadings) cannot show his good character,⁴ unless it is first impeached by the defendant.⁵ Evidence of threats made to an officer by a brother of the plaintiff after the arrest is admissible for the purpose of justifying the officer in putting the plaintiff in irons.⁶ So where, in an action against a police-officer for assault and battery and false imprisonment, it appeared that the officer was informed that a felony had been committed by the plaintiff, upon which the arrest was made by the officer, the plaintiff resisting and continuing his resistance while being conveyed to the station-house, it was held that evidence that the plaintiff, while on the way to the station-house, and making actual resistance, threatened that he would murder the defendant or any one who attempted to arrest him, was admissible as bearing upon the question of the propriety of the force used by defendant.⁷

§ 1079. **Pleading.**—The common-law action for the false imprisonment is trespass,⁸ and not case.⁹ It is not essential (as in the case of the action for malicious prosecution) that the imprisonment was malicious and without

¹ *Newton v. Locklin*, 77 Ill. 103; *Girdner v. Taylor*, 6 Heisk. 244.

² *Newton v. Locklin*, 77 Ill. 103; *Girdner v. Taylor*, 6 Heisk. 244.

³ *Rogers v. Wilson*, Minor, 407; 12 Am. Dec. 61.

⁴ *Cochran v. Toher*, 14 Minn. 385.

⁵ *Am. Ex. Co. v. Patterson*, 73 Ind. 430.

⁶ *Cochran v. Toher*, 14 Minn. 385.

⁷ *Fulton v. Staats*, 41 N. Y. 498.

⁸ *Platt v. Niles*, 1 Edm. Sel. Cas. 230; *Berry v. Hamill*, 12 Serg. & R.

210; *Price v. Graham*, 3 Jones, 545; *Holly v. Carson*, 39 Ala. 345; *Castro v. De Uriarte*, 12 Fed. Rep. 250; *Allen v. Greenlee*, 2 Dev. 370; *Stauber v. Seymour*, 5 McLean, 267; *Maher v. Ashmead*, 30 Pa. St. 344; 72 Am. Dec. 708.

⁹ *Berry v. Hamill*, 12 Serg. & R. 210; *Price v. Graham*, 3 Jones, 545; *Holly v. Carson*, 39 Ala. 345; *Platt v. Niles*, 1 Edm. Sel. Cas. 230; but see *Barhydt v. Valk*, 12 Wend. 145; 27 Am. Dec. 124.

probable cause,¹ and the complaint need not allege this.² The particular instrumentality by which the plaintiff was deprived of his liberty should not be set out in the complaint. If the circumstances of the arrest are set forth, they may be struck out on motion.³ A declaration averring that the imprisonment of the plaintiff had been effected by means of threats and violence, and was without any reasonable or probable cause, contains a sufficient averment of malice to permit proof of it, and to justify a recovery for an aggravation of damages on that ground.⁴ A complaint need not aver that the facts complained of were done illegally, or wrongfully, or without competent authority.⁵ A plea justifying an arrest without a warrant on suspicion of felony should set forth the grounds of suspicion.⁶ An answer which attempts to justify the arrest and imprisonment complained of must identify the arrest justified with the arrest complained of, or it will be bad on demurrer.⁷ But the answer sufficiently identifies the imprisonment justified if it is stated to be the same imprisonment complained of by the plaintiff.⁸ An action for false imprisonment and one for malicious prosecution may be joined.⁹

¹ *Colter v. Lover*, 35 Ind. 285; 9 Am. Rep. 735; *Parsons v. Harper*, 16 Gratt. 64; *Bonesteel v. Bonesteel*, 30 Wis. 511; *Akin v. Newell*, 32 Ark. 605; *Carey v. Sheets*, 60 Ind. 17; *Chrisman v. Carney*, 33 Ark. 316; *Howard v. Lillard*, 17 Mo. App. 228.

² *Gallimore v. Ammerman*, 39 Ind. 323; *Carey v. Sheets*, 60 Ind. 17; *Akin v. Newell*, 32 Ark. 605; *Colter v. Lover*, 35 Ind. 285; 9 Am. Rep. 735.

³ *Eddy v. Beach*, 7 Abb. Pr. 17; *Shaw v. Jayne*, 4 How. Pr. 119.

⁴ *Brushaber v. Stegemann*, 22 Mich. 266; *Boaz v. Tate*, 43 Ind. 60.

⁵ *Gallimore v. Ammerman*, 39 Ind. 323.

⁶ *Wade v. Chaffee*, 8 R. I. 224; 5 Am. Rep. 572; *Boaz v. Tate*, 43 Ind. 69.

⁷ *Gallimore v. Ammerman*, 39 Ind. 323; *Young v. Warder*, 94 Ind. 357.

⁸ *Scircle v. Neeves*, 47 Ind. 289.

⁹ *Castro v. De Uriarte*, 12 Fed. Rep. 250. *Contra*, *Nebenzahl v. Townsend*, 61 How. Pr. 353.

TITLE XII.

MALICIOUS PROSECUTION.

TITLE XII.

MALICIOUS PROSECUTION.

CHAPTER LIII.

WHEN ACTION LIES.

§ 1080. Malicious prosecution — Criminal prosecution.

§ 1081. Civil suit and arrest or attachment.

§ 1082. Civil action without arrest or attachment.

§ 1080. Malicious Prosecution — Criminal Prosecution.

—An action for malicious prosecution lies where one with malice and without reasonable and probable cause puts the criminal law in force against another.¹ “To put into force the process of the law maliciously, and without any reasonable and probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action.”² “There is no similitude or analogy, said Lord Mansfield in *Johnstone v. Sutton*,³ “between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendant’s having done that which upon the stating of it is manifestly illegal. This kind of action is for a prosecution which upon the stating of it is manifestly legal. The essential ground of this action is, that a legal prosecution was carried on without a probable cause. We say this is

¹ *Churchill v. Siggers*, 3 El. & B. 236; *Mowry v. Miller*, 3937; *Dennis v. Ryan*, 5 Lans. 350; 65 N. Y. 385; 22 Am. Rep. 635; *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Morris v. Scott*, 21 Wend. 281; 34

Am. Dec. 236; *Mowry v. Miller*, 3937; *Dennis v. Ryan*, 5 Lans. 350; 65 N. Y. 385; 22 Am. Rep. 635; *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Morris v. Scott*, 21 Wend. 281; 34

² *Campbell, C. J.*, in *Churchill v. Siggers*, 3 El. & B. 936.

³ 1 Term Rep. 554.

emphatically the essential ground, because every other allegation may be implied from this, but this must be substantially and expressly proved, and cannot be implied." The action will lie for maliciously and without probable cause instituting and carrying forward proceedings under a search-warrant.¹ The right of action for malicious prosecution is several, and not joint.² The action, it is said, is not favored by the courts.³

§ 1081. **Civil Suit and Arrest or Attachment.**—A malicious prosecution without probable cause will also lie where, though the proceedings are civil, and not criminal, they involve the arrest of the party complaining, or the attachment, sequestration, or other interference with his property, or injure him in some special manner.⁴ "It may be," as said in a late case in New York, "that the rule stated as governing these actions is harsh. It may be that it would have been better to have held a man to a strict accountability who, upon a claim made, deprived his debtor of his liberty, if he failed to prove his demand good; but

¹ *Whitson v. May*, 71 Ind. 269.

² *McLeod v. McLeod*, 73 Ala. 42.

³ *Savile v. Roberts*, 1 Ld. Raym. 374; *Reynolds v. Kennedy*, 1 Wils. 233.

⁴ 1 *Hilliard on Torts*, 443; *Mayer v. Walter*, 64 Pa. St. 283; *McNamee v. Minke*, 49 Md. 122; *Sledge v. McLaven*, 29 Ga. 64; *O'Grady v. Julian*, 34 Ala. 88; *Bump v. Betts*, 19 Wend. 421; *Whipple v. Fuller*, 11 Conn. 582; 29 Am. Dec. 330; *Watkins v. Baird*, 6 Mass. 506; 4 Am. Dec. 170; *Lawrence v. Hagerman*, 56 Ill. 68; 8 Am. Rep. 674; *Collins v. Hayte*, 50 Ill. 353; *Stewart v. Cole*, 46 Ala. 646; *McKellar v. Couch*, 34 Ala. 336; *Donnell v. Jones*, 13 Ala. 490; 17 Ala. 689; *Tancred v. Leyland*, 16 Q. B. 669; *Herman v. Brookerhoff*, 8 Watts, 240; *Henderson v. Jackson*, 9 Abb. Pr., N. S., 393; 3 *Sutherland on Damages*, 699; *Cox v. Taylor*, 10 B. Mon. 17; *Robinson v. Kellum*, 6 Cal. 399; *Preston v. Cooper*, 1 Dill. 489; *De Medipa v. Grove*, 10 Q. B. 168; *Savage v. Brewer*, 16

Pick, 453; 28 Am. Dec. 255; *Burkhart v. Jennings*, 2 W. Va. 242; *Fortman v. Rottier*, 8 Ohio St. 548; 72 Am. Dec. 606; *Tomlinson v. Warner*, 9 Ohio, 103; *Nelson v. Danielson*, 82 Ill. 545; *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Farley v. Danks*, 4 El. & B. 493; *Sinclair v. Eldred*, 4 Taunt. 7; *Austin v. Debnam*, 3 Barn. & C. 139; *Churchill v. Siggers*, 3 El. & B. 937; *Besson v. Southard*, 10 N. Y. 236; *Barhaus v. Sanford*, 19 Wend. 417; *Pierce v. Thompson*, 6 Pick. 193; *Weaver v. Page*, 6 Cal. 681; *Lindsay v. Larned*, 17 Mass. 190; *Hayden v. Shed*, 11 Mass. 500; *Welser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 Mo. 321; *Williams v. Hunter*, 3 Hawks, 545; 14 Am. Dec. 597, and note; *McCullough v. Grishobber*, 4 Watts & S. 201; *Spengler v. Davy*, 15 Gratt. 381; *Wood v. Weir*, 5 B. Mon. 544; *Fullenwider v. McWilliams*, 9 Bush, 389; *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *Hoyt v. Macon*, 2 Col. 113.

such has not been the view of courts, and it is too late now to change it.”¹ The court was speaking of an arrest in a civil case, as allowed by the laws of Rhode Island, in the action before it.

Thus an action will lie where a civil suit is maliciously and without probable cause begun by the arrest of the party defendant;² for maliciously and without cause instituting proceedings in bankruptcy against another;³ for maliciously attaching the party's property,⁴ even though there was an indebtedness and ground for a suit;⁵ for the malicious institution of proceedings to have one declared insane;⁶ for falsely “suing out and prosecuting before the commissioner of the general land-office of the United States, an officer having jurisdiction, etc., a caveat impeaching the plaintiff's entry [of public lands], on the ground and allegation of fraud”;⁷ entering up a judgment and suing out execution after the demand is satis-

¹ *Richardson v. Virtue*, 2 Hun, 208. And see *Emerson v. Cochran*, 111 Pa. St. 619.

² *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521; *Burbans v. Sanford*, 19 Wend. 417; *Watkins v. Baird*, 6 Mass. 506; 4 Am. Dec. 170; *Plummer v. Dennett*, 6 Me. 421; 20 Am. Dec. 316; *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

³ *Chapman v. Pickersgill*, 2 Wils. 145; *Johnson v. Emerson*, 25 L. T., N. S., 337; *Whitworth v. Hall*, 2 Barn. & Adol. 695; *Farley v. Danks*, 4 El. & B. 493; *Brown v. Chapman*, 3 Burr. 1418.

⁴ *Preston v. Cooper*, 1 Dill. 589; *Williams v. Hunter*, 3 Hawks, 545; 14 Am. Dec. 597; *Wood v. Weir*, 5 B. Mon. 544; *McCullough v. Grishobber*, 4 Watts & S. 201; *Walser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 Mo. 321; *Fullenwider v. McWilliams*, 7 Bush, 389; *Spengler v. Davy*, 15 Gratt. 381; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Pierce v. Thompson*, 6 Pick. 193; *Nelson v. Danielson*, 82 Ill. 545; *Shaver v. White*, 6 Munf. 110; 8 Am. Dec. 730. Where an attachment is wrong-

fully sued out on grounds untrue in fact, actual damages may be recovered though there was probable cause: *Carothers v. McIlhenny Co.*, 63 Tex. 138; *Bear v. Marx*, 63 Tex. 298. And giving a bond of indemnity as required by statute does not defeat the action: *Lawrence v. Hagerman*, 56 Ill. 68; 8 Am. Rep. 674. The defendant cannot justify or mitigate the wrongful attachment of goods by showing that he offered to return the property on the next day in the same condition: *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Rep. 3. And it is no defense that defendant, before taking out the attachment, heard that some other creditor was going to attach: *Carothers v. McIlhenny Co.*, 63 Tex. 138.

⁵ *Tomlinson v. Warner*, 9 Ohio, 103; *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Savage v. Brewer*, 16 Pick. 453; 28 Am. Dec. 255; *Fortman v. Rottier*, 8 Ohio St. 548; 72 Am. Dec. 606; *Herman v. Brookerhoff*, 8 Watts, 240.

⁶ *Lockenour v. Sides*, 57 Ind. 360; 26 Am. Rep. 58.

⁷ *Hoyt v. Macon*, 2 Col. 113.

fied;¹ suing out an attachment for an amount greatly in excess of the debt;² causing an arrest for more than is due;³ levying an execution for an excessive amount;⁴ causing an arrest when the party cannot procure bail, and keeping him imprisoned until he is forced to surrender property to which the prosecutor is not entitled;⁵ or for maliciously suing out an injunction,⁶—though it has been held that in such cases the only remedy is on the attachment bond.⁷ A party who has been fraudulently induced to come within the jurisdiction of a court so as to render him or his property amenable to its process may have his action therefor.⁸

ILLUSTRATIONS. — A corporation maliciously sued plaintiff, and, on *ex parte* application, obtained an injunction restrain-

¹ *Barnett v. Reed*, 51 Pa. St. 190; 88 Am. Dec. 574.

² *Savage v. Brewer*, 16 Pick. 453; 28 Am. Dec. 255. Where one settles a suit against him by allowing all that was claimed in it, he cannot base an action for malicious prosecution on such suit: *Sartwell v. Parker*, 141 Mass. 405.

³ *Jenings v. Florence*, 2 Com. B., N. S., 467; *Austin v. Debnam*, 3 Barn. & C. 139. The intentional non-entry of a writ in which property has been attached, and the bringing a new action for the same cause, attaching the same and other property, is held no ground for an action: *Johnson v. Reed*, 136 Mass. 421.

⁴ *Sommer v. Wilt*, 4 Serg. & R. 19; *Churchill v. Siggers*, 3 El. & B. 929, the court saying: "To put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is *prima facie* lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum

than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the court or a judge that he may be discharged, and that satisfaction may be entered upon the payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by an action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause; i. e., the creditor well knowing that the sum for which the execution is sued out is excessive, and his motive being to oppress and injure the debtor. The court or judge to whom a summary application is made for the debtor's liberation can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment, and have been utterly ruined in his circumstances."

⁵ *Grainger v. Hill*, 4 Bing. N. C. 212; *Krug v. Ward*, 77 Ill. 603.

⁶ *Robinson v. Kellum*, 6 Cal. 399; *Cox v. Taylor*, 10 B. Mon. 17.

⁷ *Gorton v. Brown*, 27 Ill. 489; 81 Am. Dec. 245.

⁸ *Wanzer v. Bright*, 52 Ill. 35.

ing him from entering on certain coal lands, and a year thereafter dismissed its action. *Held*, that he could maintain an action for malicious prosecution: *Newark Coal Co. v. Upson*, 40 Ohio St. 17. Defendants, claiming to be creditors of the plaintiff's husband, maliciously and without probable cause filed a notice of *lis pendens* and complaint affecting her lot of land, charging that her title thereto was fraudulent as against such creditors. *Held*, to state a good cause of action: *Smith v. Smith*, 20 Hun, 555. A mortgage creditor levied on the property, contrary to an agreement not to enforce the mortgage within a certain time. *Held*, that the debtor had a right of action for the actual injury, without proof of malice or want of probable cause: *Juchter v. Boehm*, 67 Ga. 534. A sued B upon a note. B pleaded payment, and also sought to set off a larger claim than the amount of the note. There was a verdict in B's favor upon the set-off. *Held*, that B was thereby concluded from suing A for a malicious prosecution founded upon the suit on the note: *Dolan v. Thompson*, 129 Mass. 205.

§ 1082. Civil Action without Arrest or Attachment. —

Whether the action will lie where no special damage is alleged over and above the mere loss of time and money consequent upon being called upon to defend a civil suit prosecuted maliciously is a question on which the authorities are not agreed. In England it is held that the action will not lie, because by statute in that country the successful party is given his costs from the losing party in all cases, and this is considered to be a sufficient remedy.¹ Most of the earlier cases in the United States, and

¹ Bac. Abr., tit. Action on the Case, H, p. 141; Bull. N. P. 11; *Waterer v. Freeman*, Hob. 205; *Temple v. Killingworth*, 12 Mod. 4; *Savile v. Roberts*, 12 Mod. 208; *Parker v. Langley*, Gilb. Cas. 163; *Goslin v. Wilcock*, 2 Wils. 305; *Purton v. Honnor*, 1 Bos. & P. 205; *Cotterell v. Jones*, 11 Com. B. 715. In *Cotterell v. Jones*, 11 Com. B. 715, the action was against two persons for conspiring together maliciously and vexatiously to commence an unfounded action against the plaintiff in the name of a third, a pauper, and in pursuance thereof so commencing and prosecuting it, whereby, although the pauper was nonsuited, the plaintiff was unable

to obtain his costs against him. The plaintiff had a verdict for the amount of the costs incurred by him in the former action, but on appeal the judgment was set aside on a question of pleading, the court holding that the declaration did not show a cause of action, because it did not allege that on the nonsuit the costs had been awarded by the court against the pauper. "It is conceded," said Jervis, C. J., "that if the party so wrongfully put forward as plaintiff in the former action had been a person in solvent circumstances, this action could not have been maintained, inasmuch as the award of costs to the defendant (the now plaintiff) upon the

a few of the recent ones, follow the English rule.¹ But others, and it would seem on better grounds,² sustain the action.³

failure of that action would, in contemplation of law, have been a full compensation to him for the unjust vexation, and consequently he would have sustained no damage." Maule, J., said: "It is conceded that this action could not be maintained in respect of extra costs, that is, costs ultra the costs given by statute to a successful defendant." And Talfourd, J., added: "It appears from the whole current of authorities than an action of this description, if maintainable at all, is only maintainable in respect of legal damage actually sustained; and that the mere expenditure of money by the plaintiff in the defense of the action brought against him does not constitute such legal damage, but that the only measure of damage is the costs ascertained by the usual course of law. There being no averment in this declaration that any such costs were incurred or awarded, no legal ground is disclosed for the maintenance of the action."

¹ *Bitz v. Meyer*, 40 N. J. L. 252; 29 Am. Rep. 233; *Wetmore v. Mellinger*, 64 Iowa, 741; 52 Am. Rep. 465; *Potts v. Imlay*, 4 N. J. L. 330; 7 Am. Dec. 603; *Cade v. Yocum*, 8 La. Ann. 477; *Woodmansie v. Logan*, 2 N. J. L. 93; *Taylor v. Wilson*, 1 N. J. L. 362; *Thomas v. Rouse*, 3 Brev. 75; *Ray v. Law*, 1 Pet. C. C. 207; *McNamee v. Minke*, 49 Md. 122; *Mayer v. Walter*, 64 Pa. St. 283; *Muldoon v. Rickey*, 103 Pa. St. 110; 44 Am. Rep. 346; *Barry v. Salt Co.*, 14 Phila. 124; *Smith v. Hintzger*, 67 Iowa, 109; *Eberly v. Rupp*, 90 Pa. St. 259.

² See articles on "The Malicious Prosecution of a Civil Suit" in *American Law Register* for May and June, 1882, in which all the authorities are cited and reviewed at length.

³ *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316; *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Eastin v. Bank of Stockton*, 66 Cal. 123; 56 Am. Rep. 77; *Whipple v. Fuller*, 11 Conn. 582; 29 Am. Dec. 330; *Vanduzer v. Linderman*, 10 Johns. 106; *Pangburn v. Bull*, 1 Wend. 345; *Cox*

v. Taylor, 10 B. Mon. 17; *Marbourg v. Smith*, 11 Kan. 554; *Woods v. Finnell*, 13 Bush, 629; *Payne v. Donegan*, 9 Ill. App. 566; *Hoyt v. Macoul*, 2 Col. 113; *Johnson v. Meyer*, 36 La. Ann. 333; *Hall v. Leaming*, 31 N. J. L. 321; 86 Am. Dec. 213. An action may be maintained for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer: *Pope v. Pollock*, Ohio, 1889. In *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316, the court, in an exhaustive opinion, says: "The defendant requested the court to charge the jury that the action could not be maintained without proof that C. was arrested or his property attached in that original suit. This leads us to consider whether an action for malicious prosecution of a civil suit without reasonable or probable cause will lie where the process in the suit so maliciously prosecuted is by summons only. In England before the statute of Marlbridge no costs were recoverable in civil actions. It seems that before the statutes entitling the defendant in civil actions to costs, if the suit terminated in his favor, he might support an action at common law against the plaintiff if the proceeding was malicious and without probable cause. But in England, since the statutes which gave costs to the defendant in all actions in case of a nonsuit, or verdict against the plaintiff, and in other stages of the cause, it seems that no action can be maintained merely in respect of a civil suit maliciously instituted, except in some cases under legislative provisions, and perhaps excepting cases where the defendant failed to obtain the ordinary costs owing to the insolvency of a third party in whose name the suit was prosecuted. It is said that those statutes give costs to successful defendants by way of damages against the plaintiff *pro falso clamore*. . . . There does not appear to be any conflict in the authorities that where anything is done maliciously, besides commencing and prosecuting

ILLUSTRATIONS. — C. had signed a promissory note as surety for one K., payable to S. or bearer. K. paid the note at matu-

a malicious or vexatious action, a suit for the damages sustained by such act may be maintained. . . . It is said in some of the cases that where the process in the malicious and unfounded suit is by attachment, an action will lie for the damage the party sustains, because in such case no cost is allowed which can be a compensation for the personal injury. But we think the fundamental principles and analogies of the common law, as laid down by the text-writers and early decisions of the English courts, do not make the manner in which the service of the process was made essential to maintain the action. The common law declares that for every injury there is a remedy. The early English cases show very clearly that before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. It would seem, however, from more recent decisions, that the present English rule, which restricts or limits the right of action for maliciously prosecuting civil suits without probable cause, stands mainly upon the ground that the costs which the statute provides the successful defendant shall recover are an adequate compensation for the damages he sustains; but under their rule it does not appear that the right of action is restricted to those cases where the process is by attachment. The justice or equity of the English rule, as a part of their system of jurisprudence, there is no occasion to consider. But in our own state not only the mode of process in civil actions, but also the general provisions of our statute for taxing costs to the defendant when the suit terminates in his favor, are opposed to making it essential to sustain an action for the malicious prosecution of a civil suit without probable cause, that his body was arrested or his property attached. . . . Our statute by which the prevailing party recovers certain costs incurred in the prosecution or defense of a civil action stands upon the ground that certain claims and rights, in respect to the matters in issue, are asserted that in

the adjudication of which a civil action, when brought and prosecuted in good faith, is a claim of right; and in order to place the administration of the law upon reasonable grounds, in respect to the rights asserted and recoverable costs, the expenses of litigating the claims of the parties, over and above certain items of costs, which the statute allows the prevailing party to recover, should be borne by the respective parties by whom such expenses are incurred, without regard to the result of the suit. But the system of taxing costs under our statute, except in a very few cases, was enacted with reference to suits brought and prosecuted in good faith. In suits so brought and prosecuted, the defendant may be subjected, or he may subject himself, to expenses not recoverable, even if the suit terminates in his favor; but of this he has no legal ground to complain when the suit is brought and prosecuted in good faith, because it is the ordinary and natural consequence of a uniform and well-regulated system to which all parties in civil actions are required to conform. But where the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such case the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff in such case has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs only, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant, in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case."

rity, but S. failed to deliver it up, alleging that he had lost it; and K. afterwards enlisted in the army, and died in another state, leaving no property. S., after the decease of K., produced the note, claiming that it had not been paid, demanded payment of C., and threatened trouble if the matter was not settled. Subsequently S. procured one B. to commence a suit against C. on it, in which case judgment was finally rendered against B. on the merits. C. brought an action against S. on these facts, alleging that he could not recover any of his taxable costs against B., as he was worthless, and that he had been put to "great trouble, annoyance, and expense in looking up witnesses, preparing his defense to said suit, and employment of counsel, and attending said court, and other large expenses of time, and money, and teams." *Held*, that C. was entitled to recover: *Closson v. Staples*, 42 Vt. 209; 1 Am. Rep. 316. M. and L., as partners, had sued S. for slander, the case being dismissed at M. and L.'s costs. S. therefore brought an action for malicious prosecution. *Held*, that the action would lie: *Marbourg v. Smith*, 11 Kan. 554. A and B were citizens of Kentucky. B, for the purpose of annoying A, and subjecting him to unnecessary expense and trouble, falsely pretended to change his residence to the state of Indiana, and went to that state, not for the purpose of residing there in good faith, but to enable him to institute a suit in the United States circuit court for the district of Kentucky, for an assault alleged to have been committed by A on B. Claiming his residence in Indiana, he falsely and maliciously, and without reasonable cause, instituted a suit against A for the said assault. A trial was had, and judgment rendered against B, and A was thereby put to great expense defending the suit, for which he claimed damages. *Held*, that the action would lie: *Woods v. Finnell*, 13 Bush, 629.

CHAPTER LIV.

REQUISITES OF THE ACTION.

- § 1083. What plaintiff must show to sustain action.
- § 1084. Commencement of prosecution.
- § 1085. Termination of prosecution.
- § 1086. Probable cause — What is — What is not.
- § 1087. Good faith and honest belief immaterial.
- § 1088. Want of jurisdiction of court immaterial.
- § 1089. Guilt or innocence irrelevant.
- § 1090. Sufficiency of charge irrelevant.
- § 1091. Personal knowledge of prosecutor unnecessary.
- § 1092. Subsequently discovered facts irrelevant.
- § 1093. The judicial proceedings — When evidence of probable cause.
- § 1094. The judicial proceedings — When evidence of want of probable cause.
- § 1095. Evidence of character and reputation of plaintiff.
- § 1096. Advice of counsel as a defense.
- § 1097. Malice also essential.
- § 1098. Evidence to show malice.

§ 1083. What Plaintiff must Show to Sustain Action.

—It is said by the supreme court of the United States in *Wheeler v. Nesbitt*,¹ that when the general issue is pleaded to in an action of malicious prosecution, the plaintiff must prove: 1. The fact of the prosecution; 2. That the defendant was the prosecutor or instigator; 3. That it terminated in the plaintiff's favor; 4. That the charge was unfounded, and made without reasonable or probable cause; 5. That the defendant in making it was actuated by malice.

§ 1084. Commencement of Prosecution.—The plaintiff must prove that a prosecution was commenced against him.² The action is commenced where the warrant was sued out, although not placed in an officer's hands or further proceeded with.³ So it is not essential that an indictment shall have been preferred on the charge.⁴ The

¹ 24 How. 544.

² *Wheeler v. Nesbitt*, 24 How. 544.

³ *Holmes v. Johnson*, Busb. 44.

⁴ *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415.

filing of the affidavit in a bastardy action is a beginning of a prosecution, though the proceedings are dismissed without any arrest.¹ But an information before a magistrate does not constitute a commencement of a prosecution.² A copy of the record of proceedings before the magistrate or other officer is the proper mode of proving the essential fact of the institution of the prosecution.³

ILLUSTRATIONS. — Defendant had the warrant read to him, was told by the constable that he was under arrest, went alone to a magistrate's office for trial, submitted himself to the magistrate, procured an adjournment, and gave the required bond. *Held*, in an action for malicious prosecution, that there was a sufficient arrest: *Malone v. Huston*, 17 Neb. 107.

§ 1085. **Termination of Prosecution.** — The plaintiff must show that the prosecution or suit in which he was prosecuted, or of which he complains, has terminated; for it would be absurd to allow one to recover who in the end might be convicted of the offense charged.⁴ The right of action accrues "whenever the particular prosecution be disposed of in such a manner that it cannot be revived; and the prosecutor, if he proceeds further, will be put to a new one";⁵ and he must show that it terminated in his favor. If it was a civil suit, he must show that a judgment was rendered for him;⁶ if a criminal prosecution, he must ordinarily show a final acquittal.⁷ Where there

¹ Coffey v. Myers, 84 Ind. 105.

² Heyward v. Cuthbert, 4 McCord, 354.

³ Olmstead v. Partridge, 16 Gray, 381; Cooper v. Utterbach, 37 Md. 282.

⁴ Wheeler v. Nesbitt, 24 How. 544; Hamilburgh v. Shepard, 119 Mass. 30; Gillespie v. Hudson, 11 Kan. 163; Gowell v. Snow, 31 Ind. 215; Hall v. Fisher, 20 Barb. 441; Smith v. Shackelford, 1 Nev. & M. 36; Lawler v. Levy, 33 La. Ann. 220. And the complaint should allege this: Johnson v. Finch, 93 N. C. 205; Rothschild v. Meyer, 18 Ill. App. 284. An action is prematurely brought while the prosecution is still pending before the grand jury: Lowe v. Wartman, 47 N. J. L. 413.

⁵ Casebeer v. Drahoble, 13 Neb. 465.

⁶ O'Brien v. Barry, 106 Mass. 300; 8 Am. Rep. 329. The termination of the former action need not be averred and proved in an action for maliciously and without probable cause procuring and employing an attachment as auxiliary to a civil action: Fortman v. Rottier, 8 Ohio St. 548; 72 Am. Dec. 606.

⁷ Bacon v. Towne, 4 Cush. 217; Boyd v. Cross, 35 Md. 194; Kirkpatrick v. Kirkpatrick, 39 Pa. St. 288; Williams v. Woodhouse, 3 Dev. 257; Mooney v. Kennett, 19 Mo. 551; 61 Am. Dec. 576; Gowell v. Snow, 31 Ind. 215; Winn v. Peckham, 42 Wis. 493.

was a conviction, the action will not lie,¹ unless the judgment is shown to have been obtained by fraud.² It is sufficient to show a discharge by the magistrate on the preliminary examination;³ or by the grand jury finding no bill;⁴ or that the indictment has been quashed, and the accused discharged by the judgment of the court;⁵ or that the prosecution was abandoned;⁶ or the release of the party on giving surety to keep the peace;⁷ or that the accused, having been held to bail to the next term of court, was discharged by the public prosecutor without action by the grand jury;⁸ or that the prosecution was dismissed before trial;⁹ or that the indictment was quashed, and the defendant discharged by the court;¹⁰ or that the defendant was discharged before trial on *habeas corpus*.¹¹ Where the suit is a civil action wholly under the control of the plaintiff, a discharge of it by him without any verdict or judgment is a sufficient ter-

¹ *Miller v. Deere*, 2 Abb. Pr. 1; *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422; *Cloon v. Gerry*, 13 Gray, 201; *Munroe v. Maples*, 1 Root, 554; *Hibbing v. Hyde*, 50 Cal. 206; *Turner v. Dinnebar*, 20 Hun, 465; *Severance v. Judkins*, 73 Me. 376.

² *Burt v. Place*, 4 Wend. 591; *Witham v. Gowen*, 14 Me. 362; *Payson v. Caswell*, 22 Me. 226. *Contra*, *Severance v. Judkins*, 73 Me. 376. Conviction of the party by a jury, though the verdict was obtained by false testimony and afterwards set aside for newly discovered evidence, and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution: *Parker v. Huntington*, 7 Gray, 36; 66 Am. Dec. 455.

³ *Cardinal v. Smith*, 109 Mass. 158; 12 Am. Rep. 682; *Swengard v. Davis*, 33 Minn. 368; *Sayles v. Briggs*, 4 Met. 421; *Leon v. Babcock*, 2 Johns. 203; *Driggs v. Burton*, 44 Vt. 124. Even if the magistrate has only power to bind over or discharge: *Moyle v. Drake*, 141 Mass. 238. And although afterwards an indictment is found for the same matter: *Costello v. Knight*, 4 Mackey, 65. The docket of the jus-

tice is admissible to show the plaintiff's discharge, even though it was not written up at the time it should have been. The plaintiff should not be prejudiced by the justice's neglect of duty: *Ames v. Snider*, 69 Ill. 376.

⁴ *Morgan v. Hughes*, 2 Term Rep. 225; *Freeman v. Arkell*, 2 Barn. & C. 494; *Bacon v. Waters*, 2 Allen, 400; *Horner v. Lawton*, 18 Fla. 328. Even without a formal order of discharge by the court: *Potter v. Casterline*, 41 N. J. L. 22.

⁵ *Hays v. Blizzard*, 30 Ind. 457.

⁶ *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 35; *Kelley v. Sage*, 12 Kan. 109; *Leever v. Hamill*, 57 Ind. 423; *Clegg v. Waterbury*, 88 Ind. 21.

⁷ *Hyde v. Greuch*, 62 Md. 577.

⁸ *Schoonover v. Myers*, 28 Ill. 308.

⁹ *Kelley v. Sage*, 12 Kan. 109; *Fay v. O'Neill*, 36 N. Y. 11; *Leever v. Hamill*, 57 Ind. 423; *McWilliams v. Hoban*, 42 Md. 56; *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412.

¹⁰ *Hays v. Blizzard*, 30 Ind. 457.

¹¹ *Walker v. Martin*, 43 Ill. 508; *Swartwout v. Dickelman*, 12 Hun, 358; *Zebley v. Storey*, 117 Pa. St. 478. *Contra*, *Merriman v. Morgan*, 7 Or. 68

mination of the suit.¹ If the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail.² If the defendant was not served with process in the attachment suit, it is not necessary for him to show that it terminated in his favor;³ and it is not essential to the maintenance of an action for the abuse of legal process by maliciously suing out an attachment that the attachment has been vacated, even though this might have been done on motion.⁴

But it is not enough to show a discharge on account of a settlement between the parties;⁵ nor an entry of a *nolle prosequi* in a criminal case;⁶ nor the striking the case from

¹ *Cardinal v. Smith*, 109 Mass. 158; 12 Am. Rep. 682; citing *Nicholson v. Coghill*, 4 Barn. & C. 21; *Watkins v. Lee*, 5 Mees. & W. 270; *Ross v. Norman*, 5 Ex. 359; *Bicknell v. Dorion*, 16 Pick. 478; *Savage v. Brewer*, 16 Pick. 453; 28 Am. Dec. 255.

² *Stewart v. Gromett*, 7 Com. B., N. S., 191.

³ *Bump v. Betts*, 19 Wend. 421.

⁴ *Rossiter v. Minnesota etc. Paper Co.*, 37 Minn. 296.

⁵ *Mayer v. Walter*, 64 Pa. St. 283; *Hamilburgh v. Shepard*, 119 Mass. 30; *Emery v. Ginnan*, 24 Ill. App. 65. In *McCormick v. Sisson*, 7 Cow. 715, S. obtained a warrant from a justice against M. on a charge of theft, and he was brought before the justice for examination, but before it was finished the parties stated that they had settled all matters of difficulty between them, and on that account he proceeded no further. It was held that no action would lie. "I think," said *Woodworth, J.*, "the objection taken that there was no acquittal is fatal. The justice did not decide whether there were grounds for the complaint or not. It is essential that the plaintiff prove he has been acquitted. The discharge must be in consequence of the acquittal. The action cannot be sustained unless the proceedings are at an end by reason of an

acquittal. In this case the proceedings ended in consequence of a settlement. The justice heard a part of the testimony only, and formed no opinion on the subject."

⁶ *Cardinal v. Smith*, 109 Mass. 158; 12 Am. Rep. 682; *Brown v. Lakeman*, 12 Cush. 482; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 Cush. 279; *Heyward v. Cuthbert*, 4 McCord, 355; *Graves v. Dawson*, 130 Mass. 78; 39 Am. Rep. 429; *Langford v. R. R. Co.*, 144 Mass. 431. *Contra*, *Brown v. Randall*, 36 Conn. 56; 4 Am. Rep. 34; *Hays v. Blizzard*, 30 Ind. 457; *Chapman v. Woods*, 6 Blackf. 504; *Stanton v. Hart*, 27 Mich. 539; *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Hatch v. Cohen*, 84 N. C. 602; 37 Am. Rep. 630; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Moulton v. Beecher*, 8 Hun, 100; *Apgar v. Woolston*, 43 N. J. L. 57; *Graves v. Dawson*, 133 Mass. 419; *Kennedy v. Holladay*, 25 Mo. App. 503. In *Indiana* it has been held that if one institutes a criminal proceeding, and is the prosecuting witness therein, but fails to appear after several adjournments, and the accused, for that reason, is suffered to go at liberty, this is sufficient termination of the prosecution, even though there be no record of the discharge: *Leever v. Hamill*, 57 Ind. 423.

the docket on motion of the district attorney with leave to reinstate it;¹ nor that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects.² The dismissal of a prosecution before a justice, with the intention of instituting another in the district court, is not sufficient. The district court prosecution must have ended first.³ But if one compounds under protest to procure his discharge, this does not afterward estop him from showing the groundlessness and malice of the proceeding.⁴ The plaintiff need not prove the exact day of his acquittal as laid in his declaration, provided it be shown to have been before the action was brought.⁵

ILLUSTRATIONS.—The declaration alleged that defendant maliciously, and without probable cause, procured the arrest and holding to bail of plaintiff, on a writ in a civil action, returnable at a certain time, at which the plaintiff appeared, but defendant did not, nor was said writ ever returned. Demurrer on the ground that it appeared that the suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of the court. *Held*, that the declaration was good: *Cardinal v. Smith*, 109 Mass. 158; 12 Am. Rep. 682. A sues B for maliciously suing out an attachment. An appeal of the attachment case is pending and undisposed of. *Held*, that the action is premature: *Reynolds v. De Geer*, 13 Ill. App. 113. M. was arrested on a warrant for larceny, brought before a justice, and committed to jail in default of bail for his appearance at the next term of the recorder's court. Before that time he was discharged from imprisonment on *habeas corpus*, and immediately brought an action for malicious prosecution. *Held*, that the action was premature, as the prosecution had not ended: *Walker v. Martin*, 43 Ill. 508. A husband and wife commenced an action for the malicious replevin of their household furniture, alleging that the replevin suit was commenced with intent to injure the wife, and actually resulted in her injury by the removal of the furniture. It appeared that the replevin suit was still pending. *Held*, that the action could not be maintained: *O'Brien v. Barry*, 106 Mass. 300; 8 Am. Rep. 329. The defendant had caused to be instituted before the police judge of

¹ *Blalock v. Randall*, 76 Ill. 224.

² *Sears v. Hathaway*, 12 Cal. 277.

³ *Schippel v. Norton*, 38 Kan. 567.

⁴ *Morton v. Young*, 55 Me. 24; 92 Am. Dec. 565.

⁵ *Mowry v. Miller*, 3 Leigh, 561; 24 Am. Dec. 680.

Salem a complaint against the plaintiff, charging her with the crime of larceny; she was adjudged to be probably guilty, and ordered to recognize with surety to answer further to the complaint at the October term, 1874, of the superior court; she thereupon entered into a recognizance to appear at the October term of the superior court, and at any subsequent term or terms until the final sentence, decree, or order of the superior court, and to abide such final sentence, decree, or order. To prove that this prosecution was at an end, the plaintiff introduced the records of the superior court to show that the grand jury had returned "no bill" in the plaintiff's case, but the record did not show that the plaintiff was thereupon discharged by the court. *Held*, that the prosecution had not terminated, and that the plaintiff could not maintain the action: *Knott v. Sargent*, 125 Mass. 95.

§ 1086. Probable Cause — What is — What is not.—

Probable cause is defined as "such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the man is guilty";¹ "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."² That is to say, to constitute probable cause for the prosecution, the facts and circumstances upon which the defendant acted must be such as under the circumstances would induce men of ordinary prudence to act as he did.³ A definition of probable cause as "knowledge

¹ Shaw, C. J., in *Bacon v. Towne*, 4 Cush. 217.

² Mr. Justice Washington, in *Munns v. Dupont*, 3 Wash. C. C. 31. These definitions have been often cited and approved: See *Boyd v. Cross*, 35 Md. 197; *Stansberry v. Fogle*, 37 Mo. 469; *Foshay v. Ferguson*, 2 Denio, 617; *McGurn v. Brackett*, 33 Me. 331; *Ames v. Snider*, 69 Ill. 376; *Landa v. Obert*, 45 Tex. 539; *Hall v. Suydam*, 6 Barb. 83; *Ulmer v. Leland*, 1 Me. 135; 10 Am. Dec. 48; *Cockfield v. Braveboy*, 2 McMull, 270; 39 Am. Dec. 123. "There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be a prob-

able cause, such as would operate on the mind of a reasonable man": *Tindal, C. J.*, in *Broad v. Ham*, 5 Bing. N. C. 722. "That apparent state of facts found to exist upon reasonable inquiry, that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed, in a criminal case, the crime charged, and in a civil case, that a cause of action existed": *Perkins, J.*, in *Lacy v. Mitchell*, 23 Ind. 67.

³ *Driggs v. Burton*, 44 Vt. 114; *Cole v. Curtis*, 16 Minn. 182; *Delegal v. Highley*, 3 Bing. N. C. 950; *Bell v. Pearcy*,

of circumstances of the guilt of the plaintiff sufficient to satisfy a reasonable mind that plaintiff was guilty, and that his guilt could reasonably be expected to be established by a criminal prosecution honestly and fairly conducted," is erroneous, because it implies that no one can prosecute but upon known competent evidence sufficient to secure a conviction.¹ The expressions "reasonable cause" and "probable cause" have essentially the same meaning.² The prosecutor is not required to act with the same impartiality and absence of prejudice in drawing his conclusions as a disinterested person would.³ He must simply act as a reasonable and prudent man would have acted in a similar position.⁴

The following have been held to show probable cause: The fact of a homicide having been committed, or a killing with a deadly weapon even in self-defense;⁵ acting on evidence sufficient to raise a reasonable suspicion;⁶ that one was arrested, committed, and indicted for a crime;⁷ probable cause for believing plaintiff to have been guilty of felony as accessory before the fact.⁸ Want of probable

5 Ired. 83; *Johnson v. Chambers*, 10 Ired. 287; *Barron v. Mason*, 31 Vt. 189; *Carl v. Ayers*, 53 N. Y. 14; *Spengler v. Davy*, 15 Gratt. 381; *Bauer v. Clay*, 8 Kan. 581; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Galloway v. Stewart*, 49 Ind. 156; 19 Am. Rep. 677; *Skidmore v. Bricker*, 77 Ill. 164; *Jacks v. Stimpson*, 13 Ill. 71; *Lawrence v. Lanning*, 4 Ind. 194; *Josselyn v. McAllister*, 25 Mich. 45; *Boyd v. Cross*, 35 Md. 194; *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Gee v. Patterson*, 63 Me. 49; *Raulston v. Jackson*, 1 Sneed, 128; *Mowry v. Whipple*, 8 R. I. 360; *Angelo v. Faul*, 85 Ill. 166; *Griffis v. Sellars*, 2 Dev. & B. 492; 31 Am. Dec. 422; *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123; *Casey v. Sevaton*, 30 Minn. 516; *Wasserman v. R. R. Co.*, 28 Fed. Rep. 802; *Krulevitz v. R. R. Co.*, 140 Mass. 573; *Dorendinger v. Tschechtelin*, 12 Dalv. 34; *Stansell v. Cleveland*, 64 Tex. 660; *Meysenberg v. Engelke*, 18

Mo. App. 346; *Krulevitz v. R. R. Co.*, 143 Mass. 228; *Ross v. Inness*, 35 Ill. 487; 85 Am. Dec. 373.

¹ *Planters' Ins. Co. v. Williams*, 60 Miss. 916.

² *Stacey v. Emery*, 97 U. S. 642.

³ *Cooley on Torts*, 183; citing *Cole v. Curtis*, 16 Minn. 183; *Carter v. Sutherland*, 52 Mich. 597.

⁴ *Bourne v. Stout*, 62 Ill. 261.

⁵ *Dietz v. Langfit*, 63 Pa. St. 239; *Glaze v. Whitley*, 5 Or. 164.

⁶ *Murray v. Long*, 1 Wend. 140; *Burlingame v. Burlingame*, 8 Cow. 141.

⁷ *Ricard v. R. R. Co.*, 15 Nev. 167. One who when charged with a crime voluntarily waives a preliminary examination and enters into a recognizance to appear at the next term of court will be taken to have confessed that there was probable cause for the charge: *Vansickle v. Brown*, 68 Mo. 627.

⁸ *Speare v. Hiles*, 67 Wis. 361.

cause cannot be inferred from proof of malice, because a person may act with malice, and yet have a justifiable reason for instituting a prosecution, and the offense itself, or at least the belief in its commission, is likely to excite malice in the injured person.¹ One cannot be held liable for malicious prosecution, if there was probable cause for the prosecution and arrest instituted by him, although he was actuated by feelings of hatred and revenge.² But the defendant must have honestly believed in the truth of the charge made by him.³ The removal from one state to another for the purpose of bringing a suit in the United States court does not show a want of probable cause for bringing the action; the plaintiff has the right to select his forum.⁴ A prosecution instituted upon the apparently truthful statements of a child eleven years old, who claimed to have seen the plaintiff commit the offense with which he was subsequently charged, is not without probable cause.⁵

The following have been held to show a want of probable cause, viz.: Mere suspicion of guilt without any facts to cause it, or without sufficient evidence to cause a reasonable man to suspect guilt;⁶ knowledge on the prosecutor's part that the party claimed a right to the property for the taking of which he prosecutes him;⁷ suspicion raised and caused by the prosecutor's own negligence;⁸

¹ *Hall v. Suydam*, 6 Barb. 83; *Murray v. Long*, 1 Wend. 140; *Masten v. Deyo*, 2 Wend. 424; *Ulmer v. Leland*, 1 Me. 135; 10 Am. Dec. 48; *Johnston v. Sutton*, 1 Term Rep. 545; *Horn v. Boon*, 3 Strob. 307; *Ames v. Snider*, 69 Ill. 376; *Williams v. Taylor*, 6 Bing. 183; *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Chapman v. Cansey*, 50 Ill. 512; *Heyne v. Blair*, 62 N. Y. 19; *Foshay v. Ferguson*, 2 Denio, 617; *Wade v. Walden*, 23 Ill. 435; *Kidder v. Parkhurst*, 3 Allen, 393; *Cloon v. Gerry*, 13 Gray, 201; *Center v. Spring*, 2 Clarke, 393; *Skidmore v. Bricker*, 77 Ill. 164; *Krug v. Ward*, 77 Ill. 603; *Caperson v. Sproule*, 39 Mo. 39; *Hall v. Hawkins*, 5 Humph. 357; *Bell v.*

Pearcy, 5 Ired. 83; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Grant v. Duel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Williams v. Van Meter*, 8 Mo. 339; 41 Am. Dec. 644; *Griffin v. Chub*, 7 Tex. 603; 58 Am. Dec. 85.

² *Leyenberger v. Paul*, 12 Ill. App. 635.

³ *Spear v. Hiles*, 67 Wis. 350.

⁴ *Woods v. Fennell*, 13 Bush, 628.

⁵ *Dwain v. Descalso*, 66 Cal. 415.

⁶ *Carl v. Ayers*, 53 N. Y. 14; *Busst v. Gibbons*, 30 L. J. Ex. 75.

⁷ *Hall v. Suydam*, 6 Barb. 83; *Weaver v. Townsend*, 14 Wend. 192; *Brooks v. Warwick*, 2 Stark. 389.

⁸ *Lacy v. Mitchell*, 23 Ind. 67; *Merriam v. Mitchell*, 13 Me. 439; 29 Am.

the prosecution of a suit which has no foundation except in the assumption that the judgment of the highest state court is not law.¹ As mere conversion of property is not larceny, proof of facts amounting only to conversion cannot establish probable cause for a charge of larceny.²

ILLUSTRATIONS. — PROBABLE CAUSE SHOWN. — A street-car driver ran his car over a young child, and killed him. His uncle had him arrested for killing the child; he was bound over, but the grand jury ignored the bill. He thereupon brought an action for malicious prosecution. *Held*, that the uncle acted with probable cause: *Dietz v. Langfit*, 63 Pa. St. 239. W. was a marine stores dealer, who bought old sacks to be used in the manufacture of paper. T., a miller, who lost many sacks every year from his customers not returning them, and who never sold any of his old sacks, or gave any one authority to do so, saw a number of sacks covered with a tarpaulin lying on a wharf near a vessel. Seeing his mark on one, he cut it open, and found that it contained pieces of sacks, some new, some old. He removed the tarpaulin, and saw some sacks on which was his mark; on others it was cut away. Being told that they were about to be shipped by W. for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect that some sacks, his property, had been stolen, and were then in the possession of W. Under this a search-warrant was issued, and W. was arrested and taken before a magistrate, who dismissed the charge. W. sued T. for malicious prosecution. *Held*, that T. acted with probable cause: *Wyatt v. White*, 5 Hurl. & N. 371; 29 L. J. Eq. 193. Defendant's hogs were stolen from him, and he learned facts which led him to believe that plaintiff was the thief, which facts he laid before the prosecuting attorney, who advised him not to prosecute, but upon finding another witness who communicated to him facts which he professed to be willing to testify to, and upon going with him before the prosecuting attorney, the latter advised a prosecution, which, however, resulted in an acquittal, the witness failing to testify to anything material. *Held*, there was probable cause for bringing the action: *Anderson v. Frink*, 85 Ill. 135. Defendant prosecuted plaintiff for perjury, committed in an action for rent brought by defendant against plaintiff's father. Plaintiff was acquitted, and sued defendant for malicious prosecution. The jury were directed if plaintiff had spoken the truth, but

Dec. 514. The prosecution of an innocent person for the abstraction of a package from the mails, which package had been overlooked through carelessness in the search, is without probable

cause: *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514.

¹ *Slaughter House etc. Co. v. Live Stock etc. Co.*, 37 La. Ann. 874.

² *Turner v. O'Brien*, 5 Neb. 542.

the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the upshot of a fallacious memory, and acting upon it, and he honestly believed that the plaintiff had sworn falsely, they would not be justified in finding that the defendant had maliciously and without reasonable and probable cause prosecuted the plaintiff. *Held*, correct: *Hicks v. Faulkner*, 46 L. T., N. S., 127; L. R. 8 Q. B. Div. 167. B. sued D. for malicious prosecution. On the trial the magistrate before whom a complaint against B. had been made was called by B. and testified: "D. was at my office with C.; the latter said he had seen the stolen property in possession of B. My recollection is that C. said they were D.'s property. I then recommended the complaint to be made." This evidence was uncontradicted. *Held*, probable cause: *Bernar v. Dunlap*, 94 Pa. St. 329. Plaintiff was acquitted on a charge of abortion, but the circumstances of the woman's death were such as to evoke the gravest suspicions, and to justify an investigation, and the grand jury found an indictment. *Held*, probable cause: *Taylor v. Rice*, 27 Fed. Rep. 264. One finding a woman fainting from the effects of a bad wound on the head, inflicted by A., was informed by her surgeon that A. ought to be arrested, but that he could not yet tell whether the wound was dangerous, and, upon the advice of an attorney at law, swore out a warrant against A. for assault with intent to kill, and A. was found guilty of assault and battery. *Held*, probable cause: *Wagner v. Aultman*, 2 Ill. App. 147. Plaintiff had been for several years prior to January, 1869, engaged in an extensive mercantile business, and had received large shipments of goods during the latter part of December, 1868, and up to January 2, 1869, through the defendants, as common carriers, on which he failed to pay the freight; and that he had received through the hands of the defendants as common carriers packages containing very considerable sums of money, being the returns from goods shipped by him to his customers; and that he had given checks to defendants for freight at several different times, all of which were dishonored at the bank on which they were drawn, for the reason that he had no funds there to pay them; and that, on the second or third day of January, when the defendants demanded payment of their bills for freight, he told them he had no money, and that since the first day of January he had been doing business as agent. *Held*, probable cause for swearing that the plaintiff had, within two years, fraudulently conveyed or assigned his property and effects, so as to hinder and delay his creditors; and to cause an attachment on that ground to be issued against his property: *Barrett v. Spaid*, 70 Ill. 408.

ILLUSTRATIONS (CONTINUED). — PROBABLE CAUSE NOT SHOWN.

— A master has a servant arrested for stealing a piece of jewelry. The article all the time is locked up in the master's desk, but he has forgotten the fact that he put it there. *Held*, want of probable cause: *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514. A took a bank note in the course of his business and paid it to B. Finding it forged, it was taken to A by an inspector who paid the amount of the note, but refused to give it up to the inspector, on the ground that he wished to recover the amount from the person who had paid it to him. The inspector arrested B and prosecuted him for having in his possession a bank note knowing it to be forged. *Held*, a want of probable cause: *Brooks v. Warwick*, 2 Stark. 389. A robbery had been committed by A, who had absconded. B, a fellow-workman, had been heard to say that he (B) had heard a few hours after the robbery that A had absconded, and that A had previously told him that he intended going to Australia. A had likewise been seen early in the morning after the robbery coming from a public entry leading to the back door of B's house. C, his master, hearing of these things, charged B before the magistrate with robbery. *Held*, no probable cause for the arrest: *Busst v. Gibbons*, 30 L. J. Ex. 75. A and a friend were on a steamboat returning from an excursion. B was also on the boat with his wife and children. One of the children had the whooping-cough, which attracted A's attention. He told his friend that he knew of a valuable remedy which been used successfully in his own family, and said he had a great mind to go over and tell B about it. His friend advised him to do so, and A went over to where B and his wife were sitting, and, not being able to approach them in front, he tapped B on the shoulder. B looked up, and A said he wanted to speak to him; B answered, "If you have anything to say, say it here." This attracted the attention of other passengers. A said that he merely wished to speak to him concerning his child's sickness, and walked away. B replied, "You never mind about my child; you mind your own business, and I will mind mine." Soon afterwards B pointed out A to a detective, and preferred a charge against him of attempting to steal a diamond pin which he wore at the time. *Held*, want of probable cause: *Carl v. Ayers*, 53 N. Y. 14. H. took a wagon from S.'s yard in the daytime, claiming it as his own under a bill of sale to him from his brother, C. S., notwithstanding he had been told that H. so claimed it, had him arrested for stealing it. Previous to the complaint, S. had stated that he had sold the wagon to C. S. had purchased it from one M., and paid part of the purchase-money; C. had afterwards paid the residue. C. executed a bill

of sale of it to H., the former having previously asked S. to purchase it from him, which S. refused. S. consulted counsel before making the complaint, and the counsel advised him to prosecute, but S. omitted to tell him of the bill of sale from C. to H. *Held*, no probable cause: *Hall v. Suydam*, 6 Barb. 83. In an action for malicious prosecution upon a charge of perjury, it appeared that the false testimony alleged as constituting perjury was upon a point not material to the issue then on trial. *Held*, want of probable cause: *Plath v. Braunsdorff*, 40 Wis. 107. The plaintiff found the cows of the defendant in his garden, and sent to him to come and pay the damage done by the cows, and to take them away. The defendant thereupon went to an attorney and told him that he had heard that the plaintiff had his cows, and had secreted them, and that he could not find them; and the attorney advised the defendant to cause the arrest of the plaintiff for larceny, which was done. *Held*, want of probable cause: *Wild v. Odell*, 56 Cal. 136. The owner of a boat which had been taken from its moorings several times, and brought back, once with a net in it, and another time with a net and some rubbish in it, caused plaintiff, who took the boat, to be arrested for grand larceny the third time it was taken. *Held*, want of probable cause: *Wanser v. Wyckoff*, 16 N. Y. Sup. Ct. 178. During the temporary absence of a tenant who was holding over, C., his landlord, closed the entrance of the premises (where the tenant lodged), but at night the tenant removed the obstruction and entered, whereupon C. returned and ordered him to leave the premises, which he refused to do, threatening to kill C. if he interfered with him. The same Saturday night C. caused the arrest of the tenant upon an affidavit that the tenant "did break into the storehouse of" C., and "threatened to kill" C. if C. "interfered with him." On Monday morning the tenant was examined and discharged from jail. *Held*, no probable cause for the arrest: *Chapman v. Cawrey*, 50 Ill. 512. The plaintiff was the lessee of certain oil-wells, was bound to deliver one third of the oil to his landlord for rent, and was forbidden by his contract to remove any of the oil from the premises without having notified his landlord, in order that he might measure it. Having sent the landlord word which he did not receive, the tenant removed certain of the oil, claiming that no rent was due. The defendants, one of whom claimed that whatever rent was due was due to him by virtue of an assignment from the landlord, which claim was not well founded, thereupon had plaintiff arrested for larceny of the oil, both of them being instigated by a purpose to get possession of the oil. The plaintiff having been discharged by the magistrate, *held*, want of probable cause: *Vinal v. Core*, 18 W. Va. 1.

§ 1087. Good Faith and Honest Belief Immaterial.—

And in the absence of this probable cause, i. e., if the circumstances were not such as to warrant a reasonable and cautious man in the belief that the plaintiff was guilty, the fact that the defendant was honest in his belief and acted in good faith is no defense.¹ Yet where the defendant was not the prosecutor in fact, but was the instigator by giving false information which led to the arrest, his motive, and that he acted in good faith, is relevant.² And honest belief and good faith disprove malice, and are relevant on the question of damages.³

§ 1088. Want of Jurisdiction of Court Immaterial.—

Sometimes it turns out that the court before whom the plaintiff was prosecuted by the defendant had no jurisdiction of the offense charged. This was early urged in England as an objection to the right to maintain an action of malicious prosecution, but without success.⁴ But in South Carolina,⁵ Massachusetts,⁶ Alabama,⁷ Indiana,⁸ and Nebraska,⁹ if the court had no jurisdiction, the action will not lie. Where the magistrate has no jurisdiction over the subject-matter, or a total want of jurisdiction appears upon the face of the warrant, the proceedings, it is said, cannot properly be called a prosecution, the accused being under no obligation to submit to the arrest or

¹ *Long v. Rodgers*, 19 Ala. 321; *Ewing v. Sanford*, 19 Ala. 605; *Winebiddle v. Porterfield*, 9 Pa. St. 139; *Hall v. Suydam*, 6 Barb. 83; *Farnam v. Feeley*, 56 N. Y. 451; *Collins v. Hayte*, 50 Ill. 353; 99 Am. Dec. 521; *Mowry v. Whipple*, 8 R. I. 360; *Jacks v. Stimpson*, 13 Ill. 701; *Hall v. Hawkins*, 5 Humph. 359; *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151; *Lawrence v. Lanning*, 4 Ind. 194; *Hays v. Blizzard*, 30 Ind. 457; *Merriam v. Mitchell*, 13 Me. 439; *Hickman v. Griffin*, 6 Mo. 37; 34 Am. Dec. 124; *Graeter v. Williams*, 55 Ind. 461; *Ramsay v. Arnott*, 64 Tex. 320; *Spalding v. Lowe*, 56 Mich. 366.

Contra, *Chandler v. McPherson*, 11 Ala. 916.

² *Farnam v. Feeley*, 56 N. Y. 451.

³ *Greer v. Whitfield*, 4 Lea, 85.

⁴ *Goslin v. Wilcock*, 2 Wils. 302; (1766); *Smith v. Cattel*, 2 Wils. 376 (1768); *Elsee v. Smith*, 1 Dowl. & R. 97 (1822).

⁵ *Cockfield v. Braveboy*, 1 McMull. 270; 39 Am. Dec. 123.

⁶ *Bixby v. Brundage*, 2 Gray, 129; 61 Am. Dec. 443; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228.

⁷ *Marshall v. Betner*, 17 Ala. 832.

⁸ *Turpin v. Remy*, 3 Blackf. 210.

⁹ *Painter v. Ives*, 4 Neb. 122.

appear at the trial or examination. In other states it is held that the fact that the court was without jurisdiction is not material; for "the sting of all these kinds of actions is malice and falsehood, and the injury done in pursuance thereof."¹ It is to be observed, however, that the difference is entirely one of pleading, the courts that deny the right to sue for malicious prosecution placing their judgment on the ground that the remedy is trespass, and not case. This technical objection is of course of little moment in those states where the reformed codes prevail.

§ 1089. Guilt or Innocence Immaterial.—The question of what constitutes probable cause does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief based upon reasonable grounds.² It is irrelevant that the acts of the accused did not amount technically to a crime; it is enough that a reasonable and prudent person, unskilled in the rules of law, would have believed them to constitute a crime.³ But if the plaintiff was in fact guilty as charged, he has no right of action.⁴

ILLUSTRATIONS.—A respectable young woman visited with some friends a dry-goods store, and in examining some goods she picked up some ribbons, which she looked at and then returned. After the party left, the proprietor missed a roll of ribbon, searched for it without success, and being told by a person who was in the store that the young lady had been looking at them, he wrote to her father, accusing her of stealing it.

¹ *Morris v. Scott*, 21 Wend. 281; 34 Am. Dec. 236; *Hayes v. Younglove*, 7 B. Mon. 545; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Sweet v. Negus*, 30 Mich. 406.

² *Bacon v. Towne*, 4 Cush. 217; *Fagnan v. Knox*, 66 N. Y. 525; *King v. Colvin*, 11 R. I. 582; *Jacks v. Stimpson*, 13 Ill. 701; *Wade v. Walden*, 23 Ill. 425; *Burlingame v. Burlingame*, 8 Cow. 141; *Foshay v. Ferguson*, 2 Denio, 617; *Scanlan v. Cowley*, 2 Hilt. 489; *Delegal v. Highley*, 3 Bing. N. C. 950; *Faris v. Starkie*, 3 B. Mon. 4; *Raulston v. Jackson*, 1 Sneed, 128;

French v. Smith, 4 Vt. 363; 24 Am. Dec. 616; *Swain v. Stafford*, 3 Ired. 289; *Johnson v. Chambers*, 10 Ired. 287; *Harkrader v. Moore*, 44 Cal. 144; *Seibert v. Price*, 5 Watts & S. 438; 40 Am. Dec. 525; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675; *Bourne v. Stout*, 62 Ill. 261; *Lytton v. Baird*, 95 Ind. 349; *McManus v. Wallis*, 52 Tex. 534; *Legallee v. Blaisdell*, 134 Mass. 473.

³ *Baldwin v. Weed*, 17 Wend. 224.

⁴ *Adams v. Lisher*, 3 Blackf. 241; 25 Am. Dec. 102; *Bartlett v. Brown*, 6 R. I. 37; 75 Am. Dec. 675.

She showed great indignation at the charge; but subsequently the store-keeper, having been told by another party that she had been seen wearing ribbon of the same kind at church, he had her arrested. On examination she was discharged, having proved that she had purchased the ribbon which she wore at another place, and the ribbon itself having been found in the interval, having been concealed in a fold of goods which lay upon the counter at the time. *Held*, that an action would not lie, as the store-keeper had reasonable cause to believe what he charged: *Swain v. Stafford*, 3 Ired. 287; 4 Id. 392.

§ 1090. **Sufficiency of Charge Irrelevant.**—So the sufficiency of the charge upon which the prosecution was instituted is not essential to the maintenance of the action. One who is sued for malicious prosecution cannot be heard to contend that the complaint upon which he procured the arrest to be made was defective.¹ The action will lie although the indictment be defective; “for in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it.”² But although in the opinion of most of the courts that the plaintiff was prosecuted by an insufficient process, or before a court not having jurisdiction, is not material, for the reason that the plaintiff’s damage is as great in one case as in the other, it is nevertheless requisite that there shall be legal process of some kind to which the plaintiff was forced to submit. For this reason it was held in *Newfield v. Copperman*³ that a complaint presented

¹ *Parli v. Reed*, 30 Kan. 534; *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402; *Stancil v. Palmeto*, 18 Ind. 321; *Cox v. Kirkpatrick*, 8 Blackf. 37; *Dennis v. Ryan*, 65 N. Y. 385; 22 Am. Rep. 635; *Forrest v. Collier*, 20 Ala. 175; 56 Am. Dec. 190; *Collins v. Love*, 7 Blackf. 416; *Anderson v. Buchanan*, Wright, 725; *Morris v. Seott*, 21 Wend. 281; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Farley v. Danks*, 4 El. & B. 493; *Streight v. Bell*, 37 Ind. 550; *Scheer v. McKeown*, 29 Wis. 586; *Marks v. Townsend*, 97

N. Y. 590; *Porter v. Gjertson*, 37 Minn. 386; *Ward v. Sutor*, 70 Tex. 343; 8 Am. St. Rep. 606. But see, holding that in this case the action is not malicious prosecution, but trespass, *Maher v. Ashmead*, 30 Pa. St. 344; 72 Am. Dec. 708; *Kramer v. Lott*, 50 Pa. St. 495; 88 Am. Dec. 556.

² *Pippet v. Hearn*, 5 Barn. & Ald. 634; *Chambers v. Robinson*, 1 Strange, 691; *Jones v. Gwynn*, 10 Mod. 214; *Wicks v. Fentham*, 4 Term Rep. 247.

³ 47 How. Pr. 87.

to a magistrate which resulted merely in his sending a letter to the accused asking him to call was not a sufficient ground for the action. So in *Heyward v. Cuthbert*,¹ the defendant went before a magistrate and made an information in the form of an affidavit drawn up by himself, in which he charged the plaintiff with a felony in stealing a slave. No warrant was issued thereon, but the magistrate returned it with other papers to the clerk's office, with an indorsement to the effect that in his opinion the supposed felony was only a trespass, adding the words "*nol. pros.*" No further proceedings were ever had thereunder. This, it was ruled, did not show such a commencement of a prosecution as to sustain the action. The court held that the phrase "commencement of the prosecution" supposed some proceeding against the party complaining, but here the information was no more than a statement of facts from which the magistrate before whom it was made was called on to determine whether in law they authorized a criminal prosecution. To this proceeding the accused was in no sense a party. The test by which to determine whether a prosecution had or had not commenced was to inquire whether the proceedings were in such a situation as to put it in the power of the party prosecuted to compel the state to proceed, or to procure his own discharge, and this can never happen until he is a party to them. The action will not lie where the arrest was made on a paper in no sense a warrant, being simply the recital of a charge made by defendant under oath.² It cannot be sustained where, because of a fatal defect in the warrant of arrest, the alleged prosecution had no legal existence.³

ILLUSTRATIONS. — S. charged B. by affidavit with obtaining money from him by false pretenses. He was discharged because the affidavit did not sufficiently charge a legal crime.

¹ 4 McCord, 355.

² *Lewin v. Uzuber*, 65 Md. 341.

³ *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123.

Held, no defense to an action of malicious prosecution by B. against S.: *Streight v. Bell*, 37 Ind. 550. S. sued D. for charging him with perjury for testifying in a criminal case that he had not altered a certain warrant. *Held*, that the fact that his evidence in the criminal case was on an immaterial point, and therefore did not constitute perjury, was immaterial: *Smith v. Deaver*, 4 Jones, 513. B. had S. arrested for stealing a dog. S. was discharged, and sued B. for malicious prosecution. *Held*, that the fact that dogs were not the subject of larceny, and B.'s information therefore did not charge a crime, was irrelevant: *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151. The affidavit to procure the arrest of A for false pretenses was defective because it did not charge the pretense to have been made concerning an existing fact. *Held*, that the action would nevertheless lie: *Stocking v. Howard*, 73 Mo. 25.

§ 1091. Personal Knowledge by Prosecutor Unnecessary.—The defendant need not have actual personal knowledge of the facts upon which he acts. He may act upon facts and circumstances brought to his knowledge through the usual and ordinary channels. He must, however, honestly believe that the information so obtained is true, and it must be of that character and obtained from such sources that men generally of ordinary care, prudence, and discretion would have acted in a similar way if they had been similarly situated.¹ If the defendant in an action for the malicious prosecution of a criminal action instigated such prosecution without probable cause, the fact that the person who, at his instigation, made the criminal complaint had probable cause to believe it to be true is no defense.² But one who institutes an unsuccessful prosecution is not necessarily liable therefor because he failed to ascertain the reputation of his informants for veracity.³

§ 1092. Subsequently Discovered Facts Irrelevant.—The test of probable cause is the facts as they were at the time the charge was made. Subsequent facts which

¹ *Galloway v. Burr*, 32 Mich. 332;
Brown v. Willoughby, 5 Col. 1.

² *Woodworth v. Mills*, 61 Wis. 44;
50 Am. Dec. 135.

³ *Jordan v. R. R. Co.*, 81 Ala. 220.

the prosecutor did not then know are no defense, even though had he been aware of them at the time they would have justified his action.¹ It is not competent to show that the accused was guilty of another and different offense from that charged;² and even if the prosecutor knew facts sufficient to justify his action, he will not be protected unless he believed them likewise.³ But the guilt of the plaintiff, or facts justifying the action, though unknown at the time to the defendant, are admissible in mitigation of damages.⁴

§ 1093. **The Judicial Proceedings—When Evidence of Probable Cause.**—The finding by the grand jury of a true bill is evidence *prima facie* of probable cause, though the prosecution may result in an acquittal.⁵ So is the committing or binding over of the accused by a magistrate to appear and answer, even though he is subsequently acquitted.⁶ So is a judgment of conviction,⁷ even when reversed by a higher court on appeal.⁸ In *Whitney v. Peck-*

¹ *Swain v. Stafford*, 3 Ired. 287; 4 Ired. 392; *Sims v. McLendon*, 3 Strob. 557; *Delegel v. Highley*, 3 Bing. N. C. 950; *Johnson v. Chambers*, 10 Ired. 287; *Foshey v. Ferguson*, 2 Denio, 617; *Galloway v. Stewart*, 49 Ind. 156; 19 Am. Rep. 677; *Skidmore v. Bricker*, 77 Ill. 164; *Josselyn v. McAllister*, 25 Mich. 45; *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Hogg v. Pinckney*, 16 S. C. 387. *Contra*, *Bell v. Pearcey*, 5 Ired. 83.

² *Hill v. Palen*, 38 Mo. 13. An unfounded prosecution cannot be justified, or the prosecutor's malice disproved, by evidence of offenses committed by plaintiff other than those for which he was prosecuted by defendant: *Carson v. Edgeworth*, 43 Mich. 241.

³ *Bigelow's Leading Cases on Torts*, 198.

⁴ *Bacon v. Towne*, 4 Cush. 217; *Newton v. Weaver*, 13 R. I. 616.

⁵ *Garrard v. Willett*, 4 J. J. Marsh. 628; *Sharpe v. Johnston*, 76 Mo. 660; *Peck v. Choteau*, 91 Mo. 138; 60 Am. Rep. 236. *Contra*, *Motes v. Bates*, 80 Ala. 382.

⁶ *Maddox v. Jackson*, 4 Munf. 462; *Hale v. Boylen*, 22 W. Va. 234; *Raleigh v. Cook*, 60 Tex. 438.

⁷ *Olsen v. Neal*, 63 Iowa, 214. The conviction of the plaintiff is conclusive evidence of the existence of probable cause only, when there is no proof showing what testimony was given at the trial: *Bowman v. Brown*, 52 Iowa, 437.

⁸ *Goodrich v. Warner*, 21 Conn. 432; *Womack v. Circle*, 29 Gratt. 192. And outside of these two states, it is held that if the defendant is convicted in the first instance and appeals, and is acquitted in the appellate court, the conviction below is nevertheless conclusive evidence of probable cause, provided the magistrate acted judicially, and not ministerially, and the judgment was not obtained fraudulently: *Whitney v. Peckham*, 15 Mass. 243; *Cloon v. Gerry*, 13 Gray, 203; *Dennehey v. Woodsum*, 100 Mass. 197; *Kaye v. Kean*, 18 B. Mon. 839; *Herman v. Brookerhoff*, 8 Watts, 240; *Witham v. Gowen*, 14 Me. 361; *Payson v. Caswell*, 22 Me. 212; *Griffis v.*

ham,¹ it was held, in Massachusetts, in 1818, that a conviction of the plaintiff of the offense charged before a justice of the peace having jurisdiction was conclusive evidence of probable cause. This ruling was questioned in *Bacon v. Towne*,² in which the magistrate had only jurisdiction to bind over; that act being considered at most only *prima facie* evidence. In New York it is *prima facie* evidence only.³ So is the disagreement of the jury at the trial.⁴ It was said in an early English case⁵ that if the evidence offered to the jury was sufficient to cause them to pause, it amounted to probable cause; but this does not require the plaintiff to prove affirmatively that the jury did not pause or deliberate.⁶

§ 1094. The Judicial Proceedings—When Evidence of Want of Probable Cause.—An acquittal after investigation is evidence of want of probable cause;⁷ so is a discharge by the investigating magistrate;⁸ so is the ignoring of a bill for the crime charged by the grand jury.⁹

Sellers, 4 Dev. & B. 176; 2 Dev. & B. 492; 31 Am. Dec. 422; Commonwealth v. Davis, 11 Pick. 432; Welch v. R. R. Co., 14 R. I. 609; Philips v. Kalamazoo, 53 Mich. 33. Where an accusation of felony is withdrawn, and respondent is convicted of a misdemeanor included in it, but is acquitted on appeal, the conviction is not such evidence of probable cause as will defeat an action for malicious prosecution based on the charge of felony: *Labar v. Crane*, 49 Mich. 561. In a suit for the malicious prosecution of a civil action, it appeared that defendant prevailed in the United States circuit court, but that there was a reversal in the United States supreme court. *Held*, that the judgment of the circuit court was conclusive on the question of probable cause: *Clements v. Odorless Excavating Apparatus Co.*, 67 Md. 361.

¹ 15 Mass. 243.

² 4 Cush. 217 (1849).

³ *Bart v. Place*, 4 Wend. 591 (1830).

⁴ *Johnson v. Miller*, 63 Iowa, 529; 50 Am. Rep. 758.

⁵ *Smith v. McDonald*, 3 Esp. 86. And see *Grant v. Duel*, 2 Rob. (La.) 17; 38 Am. Dec. 228.

⁶ *Bacon v. Towne*, 4 Cush. 217.

⁷ *Straus v. Young*, 36 Md. 246; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644. See *Heldt v. Webster*, 60 Tex. 207. *Contra*, *Bitting v. Ten Eyck*, 82 Ind. 421; 42 Am. Rep. 505; *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85.

⁸ *Bostick v. Rutherford*, 4 Hawk. 83; *Mitchinson v. Cross*, 58 Ill. 366; *Cooper v. Utterbach*, 37 Md. 282; *Sharpe v. Johnston*, 76 Mo. 660; *Frost v. Holland*, 75 Me. 108; *Bornholdt v. Sonillard*, 36 La. Ann. 103.

⁹ *Sappington v. Watson*, 50 Mo. 83; *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412. In California, where proceedings before a grand jury are not, as formerly, a mere examination of the case of the prosecution, but are in fact a preliminary trial, and one in which the accused may appear by his witnesses and make his defense, and may himself be sworn and testify in

But these facts are not conclusive of want of probable cause: they are only *prima facie* evidence of it.¹ It is error for the court to charge that the bare fact of "arrest and liberation" in the police court establishes conclusively a want of probable cause.² The defendant may show that the plaintiff was actually guilty, though acquitted, and this by any evidence in his power, though discovered after the prosecution began or after it ended. "The law does not give the action to a guilty man. He brings it as an innocent one, and if it appear on the trial in any way that he is not, he must fail."³ A judgment for the defendant in an attachment suit does not estop the plaintiff in an action for wrongfully and vexatiously suing it out from proving that the debt upon which the attachment issued was actually due.⁴ A discharge from prosecution by a *nolle prosequi* is not *prima facie* evidence of want of probable cause;⁵ nor is the failure of proceedings to declare the plaintiff a bankrupt;⁶ nor the abandonment of the prosecution.⁷

ILLUSTRATIONS.—The firm of A. & Co., claiming that S. was indebted to them, commenced an action to enforce payment. S. defended, and while the action was at issue, his brother brought suit against him, which was not defended, and recovered judgment. A. & Co., being advised by their attorney that S. had committed an act of bankruptcy, filed a petition in the bankrupt court against him asking for a warrant for the seizure of goods, which warrant was granted, and the goods seized. Thereafter the suit of A. & Co. against S. was decided adversely to A. & Co., and the proceedings in bankruptcy were dismissed on the ground that A. & Co. had no claim against S. *Held*, not to

his own behalf, the fact that the grand jury dismissed the charge on which plaintiff in an action for malicious prosecution was arrested affords no evidence of want of probable cause for the complaint: *Ganea v. R. R. Co.*, 51 Cal. 140.

¹ *Cooper v. Utterback*, 37 Md. 282; *Flickinger v. Wagner*, 46 Md. 581; *Mitchinson v. Cross*, 58 Ill. 366; *Israel v. Brooks*, 23 Ill. 575

² *Rogers v. Mahoney*, 62 Cal. 611.

³ *Bell v. Percy*, 5 Ired. 83; *Barber v. Gould*, 20 Hun, 446; *Parkhurst v. Masteller*, 57 Iowa, 474.

⁴ *Marshall v. Betner*, 17 Ala. 832.

⁵ *Flickinger v. Wagner*, 46 Md. 580; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583.

⁶ *Stewart v. Sanneborn*, 98 U. S. 187.

⁷ *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123.

be sufficient to entitle S. to maintain an action against A. & Co. for malicious institution of proceedings in bankruptcy against him: *Stewart v. Sanneborn*, 98 U. S. 187.

§ 1095. **Evidence of Character and Reputation of Plaintiff.** — Evidence of the general bad reputation of the plaintiff before the institution of the prosecution is admissible on the question of reasonable cause. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if they tended to throw a charge of guilt upon a man of good reputation.¹ Bad character, added to other circumstances, might amount to such a reasonable ground of suspicion as to induce a person innocent of any malicious motives to proceed against him; for it requires weaker circumstances of suspicion to commence a prosecution against a man of bad character than against a man of good character.² So evidence of his good character and reputation is admissible on the plaintiff's behalf.³ But the character of the plaintiff *after* the prosecution cannot be gone into; for it could have had no effect on its institution.⁴ Evidence of the character of the plaintiff may be admissible on another ground; i.e., in mitigation of damages. In order to ascertain the injury done to the plaintiff, the jury must necessarily take into consideration his personal character. If good, his damages should be greater; if bad, smaller.⁵ But only his general character, not particular acts, is admissible.⁶

¹ *Bacon v. Towne*, 4 Cush. 217; *Hitchcock v. North*, 5 Rob. (La.) 328; 39 Am. Dec. 540; *Rosenkrans v. Barker*, 115 Ill. 331; 56 Am. Rep. 169.

² *Bostick v. Rutherford*, 4 Hawks, 83; *Sherwood v. Reed*, 35 Conn. 450; 95 Am. Dec. 285; *Martin v. Hardesty*, 27 Ala. 458; 62 Am. Dec. 773.

³ *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135; *Blizzard v. Hays*, 46 Ind. 166; 15 Am. Rep. 291. *Contra*, *Kennedy v. Holladay*, 25 Mo. App. 503.

⁴ *Bostick v. Rutherford*, 4 Hawks, 83; *Winebiddle v. Porterfield*, 9 Pa. St. 137.

⁵ *Bostick v. Rutherford*, 4 Hawks, 83; *Winebiddle v. Porterfield*, 9 Pa. St. 137; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Gregory v. Chambers*, 78 Mo. 294.

⁶ *Gregory v. Thomas*, 2 Bibb, 286; 5 Am. Dec. 608; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693.

Evidence of defendant's reputation for peaceableness at the time of the encounter out of which the prosecution grew is inadmissible as evidence in chief.¹

§ 1096. **Advice of Counsel.**—The advice of counsel, given after a full examination of the facts in the case, will protect the prosecutor from a subsequent action; for it makes out a case of probable cause.² And this is so even though the opinion is incorrect and the advice wrong, provided they are given understandingly.³ But the pros-

¹ Walker v. Pittman, 108 Ind. 341.

² Snow v. Allen, 1 Stark. 502; Ravenga v. Mackintosh, 2 Barn. & C. 693; Chandler v. McPherson, 11 Ala. 916; Turner v. Walker, 3 Gill & J. 380; 22 Am. Dec. 329; Wood v. Weir, 5 B. Mon. 544; Skidmore v. Bricker, 77 Ill. 164; Wicker v. Hotchkiss, 62 Ill. 107; 14 Am. Rep. 75; Fisher v. Forrester, 33 Pa. St. 501; Potter v. Seale, 8 Cal. 217; Lemay v. Williams, 32 Ark. 166; Palmer v. Richardson, 70 Ill. 545; Davie v. Wisner, 72 Ill. 262; Phillips v. Bonham, 16 La. Ann. 387; Gould v. Gardner, 8 La. Ann. 11; Hall v. Suydam, 6 Barb. 83; Ames v. Snider, 69 Ill. 376; Burgett v. Burgett, 43 Ind. 78; Blunt v. Little, 3 Mason, 102; Stone v. Swift, 4 Pick. 389; 16 Am. Dec. 349; Griffin v. Chubb, 7 Tex. 603; 58 Am. Dec. 85; Bartlett v. Brown, 6 R. I. 37; 75 Am. Dec. 675; Ames v. Rathbun, 55 Barb. 194; 37 How. Pr. 289; Collins v. Hayte, 50 Ill. 337; 99 Am. Dec. 521; Anderson v. Friend, 71 Ill. 475; Wright v. Hanna, 98 Ind. 217; Allen v. Codman, 139 Mass. 136. In Texas it is held that it is not, as matter of law, a defense that defendant acted under the advice of counsel. The questions of malice and probable cause are for the jury on all the facts in the case: Glasgow v. Owen, 69 Tex. 167. The defense of advice of counsel is referable rather to the issue of malice than to that of probable cause: Brewer v. Jacobs, 22 Fed. Rep. 217. The defense need not be specially pleaded: Sparling v. Conway, 75 Mo. 510; Folger v. Washburn, 137 Mass. 60. It is admissible under the general denial: Sparling v. Conway, 6 Mo. App. 283.

³ Hall v. Hawkins, 5 Humph. 359;

Murphy v. Larson, 77 Ill. 172; Bartlett v. Brown, 6 R. I. 37; 75 Am. Dec. 675; Clements v. Obsly, 2 Car. & K. 686; Richardson v. Virtue, 2 Hun, 208; Eastman v. Keasor, 44 N. H. 518; Sommer v. Wilt, 4 Serg. & R. 20. In Le Maistre v. Hunter, Bright. 495, Rogers, J., said: "The opinion of private counsel of a prosecution cannot amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly and truly stated. Even the application to counsel and the opinion of counsel, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose, and the statement made at the time must be fair and full, and consistent with that purpose." Woodward, J., in Walter v. Sample, 25 Pa. St. 275, decided several years later, thought the words "unless the facts clearly warrant it," as used by Rogers, J., in Le Maistre v. Hunter, ill chosen and liable to misrepresentation. What must the facts "clearly warrant,"—the opinion of counsel, or the prosecution? Which ever was intended, this expression would make the defense depend on the soundness of the legal opinion. If the facts must clearly warrant the legal opinion, then the legal opinion, to be a defense, must be the judgment of the highest court,—must be correct at all hazards; if the facts must clearly warrant the prosecution, then the professional opinion is useless. "No matter how candidly and faithfully a prosecutor has submitted the facts to his legal adviser and followed his ad-

ecutor must have made a full and fair disclosure of all the material facts to his counsel.¹ There must be no suppression, evasion, or falsehood on the client's part in stating his case to the attorney; he must not make the application as a mere cover for the prosecution.² The party must not omit to state every fact known to him, even though he honestly supposed it was not material,³ and he must have divulged every fact which by reasonable diligence he might have ascertained;⁴ it is not neces-

vice, if they turn out insufficient for the support of the prosecution, he is liable in an action for malicious prosecution. On this principle every acquittal of a defendant would be followed by such an action. A qualification of the rule in terms like these destroys the rule itself. The law is not so. Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen": *Walter v. Sample*, 25 Pa. St. 275. The defendant may prove by his attorney what opinion the latter gave him as to his right of action and arrest of the plaintiff. To limit the inquiry as to whether the attorney advised the suit to be brought is improper: *Collins v. Hayte*, 50 Ill. 337; 99 Am. Dec. 521.

¹ *Ash v. Marlow*, 20 Ohio, 119; *Kimmel v. Henry*, 64 Ill. 505; *Sharpe v. Johnston*, 59 Mo. 557; *Walter v. Sample*, 25 Pa. St. 275; *Ross v. Inness*, 35 Ill. 487; *Hall v. Suydam*, 6 Barb. 83; *Cooper v. Utterbach*, 37 Md. 282; *Bliss v. Wyman*, 7 Cal. 257; *Thompson v. Lumley*, 50 How. Pr. 105; *Aldridge v. Churchill*, 28 Ind. 62; *Forbes v. Hagman*, 75 Va. 168; *Decoux v. Lieux*, 33 La. Ann. 392; *Logan v. Maytag*, 57 Iowa, 107; *Smith v. Davis*, 3 Mont. 109;

Roy v. Goings, 112 Ill. 656; *Moore v. R. R. Co.*, 37 Minn. 17; *Jones v. Jones*, 71 Cal. 89; *Cuthbert v. Galloway*, 35 Fed. Rep. 466; *Mesher v. Iddings*, 72 Iowa, 553; *Beidler v. Beirnaert*, 25 Ill. App. 422.

² *Walter v. Sample*, 25 Pa. St. 275.

³ *Hill v. Palm*, 38 Mo. 13; *Sharpe v. Johnston*, 59 Mo. 557; but see *Motes v. Bates*, 80 Ala. 382.

⁴ *Sappington v. Watson*, 50 Mo. 83; *Thompson v. Mussey*, 3 Greenl. 305; *Stevens v. Fassett*, 27 Me. 266; *Pipkin v. Haucke*, 15 Mo. App. 373; *Galloway v. Stewart*, 49 Ind. 156; *Bliss v. Wyman*, 7 Cal. 257; *Hewlett v. Crutchley*, 5 Taunt. 277. *Contra*, *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Dec. 231. In *Johnson v. Miller*, *supra*, the court instructed the jury as follows: "Whether or not the defendants, or some of them, did, before instituting the proceedings, make a full, fair, and honest statement to the district attorney of all the material facts bearing upon the guilt of plaintiff of which they had knowledge, and which they could have ascertained by reasonable diligence, and whether, in commencing such prosecution, the defendants acted in good faith, upon the advice of said district attorney, are questions of fact to be determined by you from all of the evidence and circumstances in the case. If you believe from the evidence that none of the defendants made a full, fair, and truthful statement of such facts to the district attorney, or that they instituted the criminal proceedings from a fixed determination of their own, rather than from the advice of said district attorney, the advice of the prosecuting attorney would not

sary that he shall have been grossly negligent in stating them.¹ The act of the defendant in carrying on an unfounded prosecution will not be excused; even where he was supported by his attorney's opinion, the latter, while

be a defense in this action." On appeal, this was held wrong, the court saying: "In our opinion, this instruction is erroneous. One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to the counsel a full and fair statement of all the material facts known to him. If he has a reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected. This, it seems to us, should be the rule when the advice of private counsel is relied on. But there are more cogent reasons for applying it where the communication is made to the public prosecutor. In criminal cases, that officer is the representative of the state. He is required, not only to prosecute indictments which are found, but it is his duty to assist in the investigation of charges against individuals which are brought to the attention of the grand jury. He is by law made the legal adviser of the grand jury. When,

complaint is made to him that a public offense has been committed, it is his duty to investigate the charge, and, if he deems it a matter of sufficient importance, to demand the attention of the grand jury. It is also his duty to have the witnesses subpoenaed, and brought before that body, and he has the right to appear also and assist in their examination. Neither he nor the grand jury are confined in their investigations to the witnesses named by the complainant, but they have the power to send for and examine any witnesses whom they have reason to believe can give any material evidence bearing on the question of the guilt of the accused. We will not, of course, be understood as holding that a party who maliciously makes a groundless charge to the district attorney, and thereby procures the finding of an indictment, is not answerable to the one injured by the proceeding. It would, however, be a very harsh rule, and one calculated to discourage entirely the making of complaints by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, existed at the time, was not protected by the advice of the attorney, simply because he did not, before making the complaint, learn of other material facts of the existence of which he might have learned by reasonable inquiry; yet that is the doctrine of the instruction. The instruction seems to have the support of Hilliard in his work on torts (see vol. 1, p. 506), and Wait in his work on actions and defenses (see vol. 4, p. 335). The doctrine of the text is supported, however, by but few of the cases cited in the notes in support of it, and we do not believe it is sound."

¹ *Scotten v. Longfellow*, 40 Ind. 25.

giving it, having expressed doubts of its propriety,¹ and where both counsel and client act in bad faith, it will be no defense.² Where an attorney and client conspire to institute a malicious prosecution, the latter cannot justify himself by the other's advice;³ and a prosecution is malicious if instituted without probable cause and from motives of private interest, though under advice of counsel.⁴ Good faith in acting upon the counsel's advice is as requisite as good faith in obtaining it. It does not follow, in every case, that because a party makes a full and correct statement of the case, as he honestly believes it, to his counsel, and receives his advice thereon, and thereupon acts upon it, his action is *bona fide*. It may generally be presumed to be so, but evidence that after the advice he was informed of facts which should have satisfied him that the party whom he accused was not guilty would destroy this presumption.⁵

If, acting under advice of counsel, a person swears out a warrant against another, and before he causes his arrest he ascertains his innocence of the charge, he is not justified in proceeding, even though he was protected by professional advice in taking out the warrant.⁶ If the party consults one attorney, who advises him to proceed, and he afterwards receives from another attorney whom he consults advice of a contrary kind, the first opinion will not avail him as a protection.⁷ And so if he does not himself believe that he has any ground for his cause of

¹ Kendrick v. Cypert, 10 Humph. 291.

² Center v. Spring, 2 Iowa, 393; Sherburne v. Rodman, 51 Wis. 474.

³ Hamilton v. Smith, 39 Mich. 222.

⁴ Grundy v. Hotel Co., 38 La. Ann. 974.

⁵ Cole v. Curtis, 16 Minn. 182; Stone v. Swift, 4 Pick. 389; 6 Am. Dec. 349; Center v. Spring, 2 Iowa, 393; Kingsbury v. Garden, 45 N. Y. Sup. Ct. 224; Sharpe v. Johnston, 76 Mo. 660.

⁶ Ash v. Marlow, 20 Ohio, 119. In

Kansas, if, after the filing of an original complaint, those who instituted the prosecution learn facts showing the innocence of the accused, they are not liable for malicious prosecution for merely withholding such information from the prosecuting attorney, as under the statutes the case is then in the hands of the attorney; but they are liable if they still insist upon, urge, and demand the prosecution: Blunk v. R. R. Co., 38 Fed. Rep. 311.

⁷ Stevens v. Fassett, 27 Me. 266.

action, the opinion of a lawyer that he has is irrelevant.¹ The advice of counsel will protect the defendant only where the questions submitted to him are questions of law, or questions involving some legal principle. Where they are simply questions of fact or inference, the case is different; for the attorney is, as to these, no more capable of advising than his client is.² The advice must be given before the proceedings are commenced.³ But evidence that the defendant, before making the complaint and taking out the warrant against the plaintiff, went to consult his attorney, but did not find him, and before the arrest and trial did consult him, and followed his advice in the prosecution, is competent upon the question of malice, and also upon that of damages.⁴

The advice, to be a protection, must be that of one duly accredited and licensed by the courts as an attorney or counselor at law.⁵ The advice of a justice of the peace or police justice is no protection;⁶ nor of one who, though

¹ *Ravenga v. Mackintosh*, 2 Barn. & C. 693.

² *Laird v. Taylor*, 66 Barb. 139.

³ "I think it ought not to be permitted to any person, after the commencement of his suit, to repel the imputation of malice, or prove probable cause by subsequently getting the opinions of counsel in his favor. What would this be but to encourage unfounded suits, and to enable parties to get rid of the effects of their own misconduct by matters *ex post facto*? What constitutes probable cause of action is, when the facts are given, matter of law, upon which the court are to decide; and it cannot be proper to introduce certificates of counsel to establish what the law is. If the party acts upon the advice of counsel, however mistaken in commencing his suit, and is honestly misled, there is some ground to excuse his act. But when he has gone on without such advice, and in point of law has no probable cause of action, it is, I think, conceding too much to allow the subsequent opinion of counsel to change the legal

rights of the parties": *Justico Story in Blunt v. Little*, 3 Mason, 102.

⁴ *Hopkins v. McGillicuddy*, 69 Me. 273.

⁵ *Murphy v. Larson*, 77 Ill. 172; *Stanton v. Hart*, 27 Mich. 539; *Olmstead v. Partridge*, 16 Gray, 381; *Beal v. Robeson*, 8 Ired. 276; *Straus v. Young*, 36 Md. 246; *Burgett v. Burgett*, 43 Ind. 78; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Sutton v. McConnell*, 46 Wis. 269; *Brooks v. Warwick*, 2 Stark. 389. He should be a "practicing attorney": *Burgett v. Burgett*, 43 Ind. 78. And a licensed attorney is presumed to be competent and qualified to give the proper advice: *Horne v. Sullivan*, 83 Ill. 30. But would this be so in a jurisdiction where citizenship and good moral character are the only requisites to admission to the bar? See *Stevens v. Fassett*, 27 Me. 266.

⁶ *Sutton v. McConnell*, 45 Wis. 269; *Olmstead v. Partridge*, 16 Gray, 381; *Brooks v. Warwick*, 2 Stark. 389; *Straus v. Young*, 36 Md. 246; *Williams v. Vanmeter*, 8 Mo. 339; 41

holding himself out as an attorney, and practicing in justice courts, is not a licensed attorney;¹ nor of a detective,² or police-officer.³

But in Pennsylvania, the advice of a city alderman, by virtue of his office a conservator of the peace, has been held to protect.⁴ The advice of an attorney who was per-

Am. Dec. 644; *Burgett v. Burgett*, 43 Ind. 78; *Potter v. Casterline*, 41 N. J. L. 22; *Brobst v. Ruff*, 100 Pa. St. 91; 45 Am. Rep. 358; *Gee v. Culver*, 12 Or. 228; *Dolbe v. Norton*, 22 Kan. 101.

¹ *Murphy v. Larson*, 77 Ill. 172; *Stanton v. Hart*, 27 Mich. 539, the court saying: "Law allows honest action, upon the advice of counsel who have been fully informed on the facts, to be a complete justification, upon the sole ground that a person has done all he could be expected to do to enable him to act safely. But it is not the policy of the law to permit innocent men to be subjected to false charges and unfounded arrests, and a person who assumes to prosecute is bound to use all reasonable means to avoid committing such a grievance. Every man of common information is presumed to know that it is not safe in matters of importance to trust to the legal opinions of any but recognized lawyers; and no matter is of more legal importance than private reputation and liberty. When a person resorts to the best means in his power for information, it will be such a proof of honesty as would disprove malice, and operate as a defense proportionate to his diligence. But there is no respectable authority for holding that advice from any but a qualified lawyer is of itself an answer to the charge of malicious prosecution, however honest the course of the party may have been in seeking for it. Such advice bears upon probable cause, while the other excuses go to disprove malice. It would be very dangerous to relax the rules on this subject. There can never be any difficulty in finding professional advisers under ordinary circumstances. And where the prosecution complained of is criminal, and not civil, there is

still less cause for removing any safeguard against oppression and vexatious proceedings. This rule originated in England, where there is no public prosecutor, and where all complaints must usually be made by private parties. They were compelled to employ counsel to prosecute, and it would have been unjust to compel them to do more than use proper diligence and fairness in choosing and instructing them. But under our system all prosecutions are put under official control, and a principal reason for this was the abuse of private prosecutions, which are very apt to be set on foot for private purposes rather than for the public good. It can rarely happen that in serious cases where there is any such doubt as would render it prudent to seek advice before acting, it will not be easy to get access to the prosecuting attorney. The very fact that a person is in doubt should teach him more caution, and lead him to communicate with the proper authorities, and put the care of the prosecution where it legally belongs. There is no need in such cases to rely on irregular advisers, and it is a practice not to be favored."

² *Breitmesser v. Stier*, 13 Phila. 80.

³ *Coleman v. Heurich*, 2 Mackey, 189.

⁴ *Thomas v. Painter*, 10 Phila. 409; *Rosenstein v. Feigel*, 6 Phila. 532. In *Laughlin v. Clawson*, 27 Pa. St. 330, the court say: "If the officers of the state, who are appointed on account of their legal learning, consider that a given state of facts is sufficient evidence of probable cause, how can the private citizen be said to be in fault in acting upon such facts, and how can the state condemn him to damages for so doing? To decide so is to use the machinery of government as a trap to

sonally interested in the subject-matter is no defense.¹ In Illinois it is laid down that the attorney must have been in good standing. Nor does the fact that he was state's attorney necessarily show him to have been in good standing, where it appears that he was intemperate, etc.²

ILLUSTRATIONS. — Plaintiff had been in the employment of the defendants as cashier for four years. A charge was made against him of a debt due from his brother, and which the defendants claimed was to be paid by the plaintiff, and which they sought to set off against his salary. He denied any such agreement, and on leaving the concern appropriated to the payment of salary due him the sum of \$166 out of moneys of the firm in his hands. There was a rule of the house that sums over five dollars paid to clerks should be paid only on checks drawn by one of the partners, but the plaintiff was not considered a clerk within this rule, and the rule even as to clerks was frequently violated. The defendants had the plaintiff arrested for embezzlement, after consulting one B, their attorney; but they did not, among other things, inform B either that the plaintiff was not considered an ordinary clerk, or that the rule had been often violated. *Held*, that these facts not having been disclosed to the attorney, his advice was no defense: *Ross v. Inness*, 35 Ill. 487. A dealer in railroad tickets sold as an unlimited ticket an excursion ticket, marked on the ticket itself and on the coupons as "not good to stop off," and not good after a certain date, which date was erased. There had been a number of instances before in which the same dealer had sold altered and spurious tickets. An officer of the company consulted the company's lawyer about it, and he took him to the state's attorney, who said that it was a case for the grand jury. *Held*, that neither the officer nor the company was liable for malicious prosecution on account of a prosecution thereupon instituted, although he did not report to the state's attorney the result of the issuance of a search-warrant upon which the dealer's office was searched, but no spurious or altered tickets found: *Thelin v. Dorsey*, 59 Md. 539. The district attorney testified that he told defendant that he did not think he could convict, and that he had not a very good case. Another witness said to defendant that he could not do anything with plaintiff, to which defendant replied that plaintiff had taken sides against him, and

ensnare those who trust in government in such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government itself, and government cannot allow

the citizen to suffer for his trust in its proper functionaries."

¹ *White v. Carr*, 71 Me. 555; 36 Am Rep. 353.

² *Roy v. Goings*, 112 Ill. 656.

that he would "set him up for his meanness." Defendant testified that other lawyers whom he consulted had advised him that he could maintain the prosecution, but none of them were produced as witnesses. *Held*, that a verdict for plaintiff was proper: *Vann v. McCreary*, Cal. 1889.

§ 1097. **Malice also Essential.**—Malice and want of probable cause must both be shown.¹ What is malice in this connection? "The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a willful disregard of the rights of others, whether it be to compass some lawful end or to do a wrong and unlawful act, knowing it to be such, constitutes legal malice."² Where a wrongful act is done with the intention of bringing about

¹ *Bell v. Graham*, 1 Nott & McC. 278; 9 Am. Dec. 687; *Ulmer v. Leland*, 1 Me. 135; 10 Am. Dec. 48; *Williams v. Hunter*, 3 Hawks, 545; 14 Am. Dec. 597; *Adams v. Lisher*, 3 Blackf. 241; 25 Am. Dec. 102; *Leidig v. Rawson*, 1 Scam. 272; 29 Am. Dec. 354; *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Williams v. Vanmeter*, 8 Mo. 337; 41 Am. Dec. 644; *Young v. Gregorie*, 3 Call, 446; 2 Am. Dec. 556; *Plummer v. Greene*, 3 Hawks, 66; 14 Am. Dec. 572; *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Shafer v. Loucks*, 58 Barb. 426; *Burnap v. Albett*, Taney, 244; *Wilson v. King*, 39 N. Y. Sup. Ct. 384; *Gourgues v. Howard*, 27 La. Ann. 339; *Smith v. Zent*, 59 Ind. 362; *Evans v. Thompson*, 12 Heisk. 534; *Cottrell v. Richmond*, 5 Mo. App. 588; *Bishop v. Bell*, 2 Ill. App. 551; *Anderson v. Coleman*, 53 Cal. 188; *Russell v. Deer*, 7 Ill. App. 181; *Turner v. O'Brien*, 11 Neb. 108; *Vinal v. Cove*, 18 W. Va. 1; *Murphy v. Martin*, 58 Wis. 276; *Porter v. White*, 5 Mackey, 180; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611;

Maloney v. Doane, 15 La. 278; 35 Am. Dec. 204; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Clements v. Odorless etc. Co.*, 67 Md. 461; 1 Am. St. Rep. 409; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Weston v. Beeman*, 27 L. J. Ex. 57; *Besson v. Southard*, 10 N. Y. 236; *Foshay v. Ferguson*, 2 Denio, 617; *Dietz v. Langfitt*, 63 Pa. St. 234; *Cook v. Walker*, 30 Ga. 519; *Willis v. Knox*, 5 S. C. 474; *Glaze v. Whitley*, 5 Or. 164; *Dickinson v. Maynard*, 20 La. Ann. 66; *Wheeler v. Nesbitt*, 24 How. 544; *Horn v. Boou*, 3 Strob. 307; *Mitchinson v. Cross*, 58 Ill. 366; *Ames v. Snider*, 69 Ill. 366; *Landa v. Obert*, 45 Tex. 539; *Mowry v. Whipple*, 3 R. I. 360; *Moore v. Sanborin*, 42 Mo. 490; *Thompson v. Lumley*, 50 How. Pr. 105; *Richardson v. Virtue*, 2 Hun, 208; *Jacks v. Stimpson*, 13 Ill. 701; *Wood v. Weir*, 5 B. Mon. 544; *Wells v. Noyes*, 12 Pick. 324; *Collard v. Gay*, 1 Tex. 494.

² *Shaw, C. J.*, in *Wells v. Noyes*, 12 Pick. 324; *Barrow v. Mason*, 31 Vt. 189; *Page v. Cushing*, 38 Me. 523; *Harpham v. Whitney*, 77 Ill. 32; *Pullen v. Glidden*, 66 Me. 202.

the consequences naturally flowing from it to the injury of another, the act is malicious in law; and it is no answer to a civil action that the party doing the wrongful act was actuated by his own interest, without any personal desire to injure the other party, or even acted under a mistaken sense of duty. To indict an innocent man on a charge false to the knowledge of the party preferring it is malicious, no matter what may have been the original motive.¹ In *Foshay v. Ferguson*,² the plaintiff, who was driving cattle to market, had, on passing the defendant's farm, received into his drove two cattle belonging to the latter, and had proceeded on his journey some miles when he was overtaken by the defendant, who charged him with the theft. He denied it, but the next day settled by paying the defendant for them. The latter then went home, and was told by one G. that the plaintiff had driven off some of his cattle. Both agreed that there was something wrong about it. Subsequently the plaintiff brought two suits against the defendant,—one for slander in charging him with stealing the cattle, the other to set aside the settlement. The defendant then went before the grand jury and had him indicted for larceny. In an action for malicious prosecution, the jury found for the plaintiff, and also that the defendant had acted maliciously in making the complaint. Nevertheless, it was held that the verdict was wrong.³ Where one unlawfully

¹ Cockburn, C. J., in *Fitzjohn v. Mackinder*, 9 Com. B., N. S., 505. "A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt, and in neither case is he liable to this kind of action"; *Johnstone v. Sutton*, 1 Term Rep. 545.

² 2 Denio, 617.

³ "There was evidence enough," said Bronson, C. J., "to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is

not enough without showing also the want of probable cause. . . . The defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle; and so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action if it were not for the fact that the defendant settled the matter with the plaintiff instead of proceeding against him for the supposed offense. If the parties intended that

invading another's close causes the occupant's arrest for forcibly defending his possession, malice may be presumed.¹ In an action for malicious arrest on civil process, neither express malice nor actual damages need be proved.²

ILLUSTRATIONS.—Defendant caused the arrest of plaintiff without probable cause, but not from any actual ill-will towards him, or any specific desire to vex or annoy him, but for the purpose of finding out who had forged a certain note in his name, then in plaintiff's possession, and which he claimed to be valid and to have been acquired in good faith. *Held*, that the arrest was malicious: *Johnson v. Ebberts*, 6 Saw. 538. An officer attached goods in A's store, and locked up the store. A and B broke into the store in the night-time and refused to leave, whereupon the officer complained of them for breaking and entering with intent to steal. *Held*, that a jury might find that the prosecution was malicious: *Bobsin v. Kingsbury*, 138 Mass. 538.

§ 1098. **Evidence to Show Malice.**—Malice, it is laid down in a number of cases, may be inferred from want of probable cause.³ Where there were no circumstances

the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony; and the fact that he made no complaint until the plaintiff commenced the two suits against him goes far to show that he was obnoxious to that charge, and that he was governed more by his own interest than by a proper regard to the cause of public justice. But however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains, and so long as it exists, it is a complete defense. There is enough in the defendant's conduct to induce a rigid scrutiny of the defense. But if upon such scrutiny it appear that he had reasonable grounds for believing the plaintiff guilty, and there

is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported."

¹ *Casebeer v. Rice*, 18 Neb. 203.

² *Hogg v. Pinckney*, 16 S. C. 387.

³ *Barton v. Kavanaugh*, 12 La. Ann. 332; *Stone v. Stevens*, 12 Conn. 219; 30 Am. Dec. 611; *Horn v. Boon*, 3 Strob. 307; *Ames v. Snider*, 69 Ill. 376; *Mowry v. Whipple*, 8 R. I. 360; *Moore v. Sanborin*, 42 Mo. 490; *Thompson v. Lumley*, 50 How. Pr. 105; *Merriam v. Mitchell*, 13 Me. 439; *Holliday v. Sterling*, 62 Mo. 321; *Newell v. Downs*, 8 Blackf. 523; *Callahan v. Caffarata*, 39 Mo. 136; *Straus v. Young*, 36 Md. 246; *Harpham v. Whitney*, 77 Ill. 32; *Wheeler v. Nesbitt*, 24 How. 544; *Bell v. Graham*, 1 Nott & McC. 278; 9 Am. Dec. 687; *Yocum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85; *Levy v. Brannan*, 39 Cal. 485; *Burnap v. Albert*, Taney, 244; *Vinal v. Cove*,

connected with the transaction out of which the prosecution arose which ought to have induced a reasonable man to believe the plaintiff guilty, and to undertake the prosecution, then there is no reasonable cause, and the jury may infer that the prosecution was malicious.¹ But it does not follow that because there was a want of probable cause malice must always be inferred. If this were so,—if want of probable cause was taken to prove malice under all circumstances,—it would be absurd to say that the gist of the action was want of probable cause and malice; for the former alone would be all that was required. It should, therefore, be said that want of probable cause for the prosecution does not necessarily imply malice.² It is, therefore, error to instruct the jury that a

18 W. Va. 1; *Decoux v. Lieux*, 33 La. Ann. 392; *Blook v. Meyers*, 33 La. Ann. 776; *Murphy v. Hobbs*, 7 Col. 541; 49 Am. Rep. 366; *Heap v. Parrish*, 104 Ind. 36; *Roy v. Goings*, 112 Ill. 656.

¹ *Cooper v. Utterbach*, 37 Md. 283.

² *Pangburn v. Bull*, 1 Wend. 345; *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514; *Stirckler v. Greer*, 95 Ind. 596; *Mowry v. Whipple*, 8 R. I. 360; *Paukett v. Livermore*, 5 Iowa, 277; *Harkrader v. Moore*, 44 Cal. 144; *Cooper v. Utterbach*, 37 Md. 282; *Dietz v. Langfitt*, 63 Pa. 234; *Harpham v. Whitney*, 77 Ill. 32; *Holliday v. Sterling*, 62 Mo. 321; *Levy v. Brannan*, 39 Cal. 485; *Hirschi v. Mettelman*, 7 Ill. App. 112; *Comisky v. Breen*, 7 Ill. App. 369; *Greer v. Whitfield*, 4 Lea, 85. Said Ruffin, C. J., in an early North Carolina case: "There may be many cases in which the influence of such bad motive may be almost irresistible, from the absence of probable cause. The grounds of suspicion may be so light as to satisfy the mind that the prosecutor could not expect the accused to be convicted on them, and that they were used as a pretense, as furnishing the opportunity, under the semblance of aiding in the execution of public justice, to gratify private ill-will. Again, however grave the circumstances of suspicion may in themselves appear, yet if the prosecutor be aware that any that are material be not as they ap-

pear, if he knew that the person charged was not guilty, the conclusion would unavoidably be, that he had no probable cause, and further, that he was actuated by malice,—the intention to use the privilege of prosecuting for a wrongful purpose. But on the other hand, there are many other cases in which a person may prosecute another, without sufficient *prima facie* evidence, without a bad motive, and from upright views of enforcing public justice. It often requires professional skill to connect and weigh the evidence, and give opposing probabilities their proper effect. Ordinary persons may honestly err in deducing conclusions from circumstances indicative of the guilt or innocence of the accused person. For it is a nice point, on which even judges differ, whether in a particular case there was or was not probable cause. If, therefore, a prosecutor erred in that point, and yet was able to show the honesty of his error, he ought not to be liable in damages. Such honesty may be established in a variety of ways; as from friendly relations between the parties, or a reluctance to institute the prosecution, except apparently as a matter of duty or from the near approach of circumstances to the constitution of probable cause, though not coming up to it, or any other evidence of the actual considerations which prompted the charge. Hence it has been properly

wrongful charge made without probable cause is malicious *per se*.¹ But though malice cannot be inferred from want of probable cause, it may be inferred from the same facts which go to establish want of probable cause, and this inference is one of law.² Malice cannot be implied where probable cause exists.³

The discontinuance of an arrest made in a civil suit is evidence of malice.⁴ So is the carrying on of a prosecution "wantonly," and for no just purpose;⁵ or setting the criminal law in motion against another, knowing that there is no ground for it;⁶ or exhibiting zeal and activity in conducting the prosecution;⁷ or a long delay in making the complaint;⁸ or the willful over-statement of the amount of stolen property in a complaint for larceny;⁹ or the discharge of the accused by the examining magistrate, or the ignoring of the indictment by the grand jury;¹⁰ or commencing a criminal prosecution for the purpose of collecting a private claim;¹¹ or where the prosecutor acts rashly, wantonly, or wickedly in charging another with a crime of which the latter is innocent;¹² or commencing

said that malice may be inferred from the want of probable cause. It is equally apparent that it is not necessarily to be inferred therefrom. On the contrary, it must in every case be properly an inquiry for the jury, as to the actual fact, under explanations from the court. If it were not so, it should be said at once that the action lies for a prosecution without probable cause, for it is obviously idle to add that there must also be malice in the prosecutor, if the want of probable cause proves malice. The law draws no such presumption; for though it often might be true, it would often be untrue in point of fact": *Bell v. Percy*, 5 Ired. 83; *Ewing v. Sanford*, 19 Ala. 605.

¹ *Harkrader v. Moore*, 44 Cal. 144.

² *Sharpe v. Johnston*, 76 Mo. 660.

³ *Kaufman v. Wicks*, 62 Tex. 234.

⁴ *Burnhans v. Sanford*, 19 Wend. 417;

Green v. Cochran, 43 Iowa, 544.

⁵ *Kerr v. Workman*, Addis. 270.

⁶ *Stevens v. R. R. Co.*, 10 Ex. 356.

⁷ *Straus v. Young*, 36 Md. 246.

⁸ *United States v. McHenry*, 6 Blatchf. 503.

⁹ *Olmstead v. Partridge*, 16 Gray, 381; *Munns v. Dupont*, 3 Wash. C. C. 31. The offense charged in the criminal complaint having been the larceny of a water-wheel of the value of three hundred dollars, evidence that such wheel was in fact worth only from two dollars to five dollars is admissible as tending to show malice: *Woodworth v. Mills*, 61 Wis. 44; 50 Am. Rep. 135.

¹⁰ This is evidence going to show the want of probable cause. And from this, too, malice may be inferred: *Sappington v. Watson*, 50 Mo. 83.

¹¹ *Gallaway v. Burr*, 32 Mich. 332; *Kimball v. Bates*, 50 Me. 308; *Brooks v. Warwick*, 2 Stark. 393; *Schofield v. Ferrers*, 47 Pa. St. 194; *Ross v. Langworthy*, 13 Neb. 492.

¹² *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125.

successive suits by defendant on the same groundless claim;¹ or where the prosecutor's information was obtained from a discharged convict then under criminal accusation; where the source of information was not disclosed to the magistrate from whom the warrant was obtained; where the arrest was made in the night-time, defendant being present; and where the prosecution was voluntarily abandoned;² or where M. procured an indictment against B. for perjury in making an affidavit that M. was insolvent, in a suit wherein M. had signed a bond for costs, knowing, or having good reason to believe, the affidavit to be true, from his embarrassed circumstances financially;³ or where the defendant deprived the plaintiff of his means of exculpation, and then prosecuted him criminally.⁴

But malice cannot be inferred from employment of counsel to prosecute the case.⁵ The purchase of a negotiable promissory note has no tendency to prove a wrongful motive in procuring an unlawful arrest in an action afterwards brought thereon.⁶ The malice of the defendant against persons other than the plaintiff is irrelevant.⁷ Malice cannot be shown by the opinion of persons at the trial that the defendant appeared vindictive while on the stand.⁸ Although a common report that the plaintiff had committed the alleged crime is not of itself sufficient to show probable cause, it may, with other circumstances, tend to negative malice, and is admissible in the defendant's behalf.⁹ Declarations of the defendant are not admissible to show malice,¹⁰ but threats are.¹¹

¹ *Magmer v. Renk*, 65 Wis. 364.

² *Chapman v. Dunn*, 56 Mich. 31.

³ *Montross v. Bradsby*, 68 Ill. 185.

⁴ *Fagnan v. Knox*, 40 N.Y. Sup. Ct. 41.

⁵ *Lawrence v. Lanning*, 4 Ind. 194; *Aldridge v. Churchill*, 28 Ind. 62.

⁶ *Underwood v. Brown*, 106 Mass. 298.

⁷ *Barton v. Kavanaugh*, 12 La. Ann. 106.

332. But evidence that defendant entertained unfriendly feelings against the family of which plaintiff was a member is admissible: *Long v. Rodgers*, 19 Ala. 330.

⁸ *Ames v. Snider*, 69 Ill. 376.

⁹ *Pullen v. Glidden*, 68 Me. 559.

¹⁰ *Moore v. Sanborin*, 42 Mo. 490.

¹¹ *Thompson v. Lumley*, 50 How. Pr.

CHAPTER LV.

WHO LIABLE — EVIDENCE AND DAMAGES.

- § 1099. Who liable — In general.
- § 1100. Liability of prosecutor for judicial error or acts.
- § 1101. Burden of proof.
- § 1102. Law and fact.
- § 1103. Evidence.
- § 1104. Damages.

§ 1099. **Who Liable — In General.** — All the persons concerned in originating and carrying on the malicious prosecution are jointly and severally liable.¹ The defendant need not have been the originator of the prosecution. Two persons may be parties to an arrest and imprisonment and both be liable,—one because he was the active promoter of the prosecution, the other because he voluntarily aided and assisted therein, either by direct personal participation or advice.² He is liable if in point of fact the indictment was preferred at his instance, though he is not avowedly the prosecutor appearing of record;³ and the plaintiff may prove by evidence *dehors* the record who in fact acted as the prosecutor in the alleged malicious prosecution.⁴ The defendant is sufficiently a prosecutor if the prosecution to which the plaintiff was subjected was instituted at his instance and request by the attorney for the state.⁵ An agent or attorney who maliciously sues out the process is liable.⁶ So may one be who gives another a general authority to use his name as he sees fit in prosecuting suits.⁷ An action cannot be maintained against

¹ *Cotton v. Huidekoper*, 2 Penr. & W. 149; *Stansbury v. Fogle*, 37 Md. 369; *Clements v. Ohrlly*, 2 Car. & K. 686; *Walser v. Theiss*, 56 Mo. 89. A suit for malicious prosecution can be maintained against several defendants without an averment of conspiracy: *Dreux v. Domec*, 18 Cal. 83.

² *Stansbury v. Fogle*, 37 Md. 369; *Cotton v. Huidekoper*, 2 Penr. & W. 149.

³ *Kline v. Shuler*, 8 Ired. 484; 49 Am. Dec. 402.

⁴ *Knauer v. Morrow*, 23 Kan. 360.

⁵ *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228.

⁶ *Warfield v. Campbell*, 35 Ala. 349; *Wood v. Weir*, 5 B. Mon. 544. As to responsibility of an attorney, see *Bicknell v. Dorion*, 16 Pick. 478.

⁷ *Kinsey v. Wallace*, 36 Cal. 462.

an attorney at law for bringing a civil action, unless he commenced it without the authority of the party in whose name it was sued, or unless there was a conspiracy between them to bring a groundless suit, the attorney knowing it to be groundless, and commenced without any intention or expectation of maintaining it.¹ Where an attorney is sued for a malicious prosecution by his client, it must appear that he knew it was both without cause and malicious.² If an attorney, from malicious motives, procure from justices of the peace an unauthorized order of attachment operating injuriously upon the defendant's rights, he is liable, as well as his client.³ And an attorney who advises, begins, and conducts a criminal prosecution upon an understanding with his client that the charge against the accused is untrue, is liable.⁴ It seems to be necessary, however, that one to be liable should advise and co-operate in the prosecution in some way. One person cannot be made liable in damages because he knows that another is about to commit an unlawful act, and does not protest. Here there is consent, perhaps, but not co-operation. Thus A, B, and C are partners, and A and B, believing that D has stolen money from the firm, commence proceedings against him. C does nothing but passively assent; he neither advises nor protests against the act of A and B. C is not liable to an action of malicious prosecution by D.⁵ Where a voluntary association for the prosecution of thieves caused plaintiff's prosecution, only the members participating therein were held liable.⁶ Advising persons not to become sureties for one who has been arrested does not tend to show that those who give such advice have conspired with the person who caused the arrest, and are therefore liable with him for

¹ *Bicknell v. Dorion*, 16 Pick. 478.

² *Peck v. Chouteau*, 91 Mo. 140; 60 Am. Rep. 236.

³ *Wood v. Weir*, 5 B. Mon. 544.

⁴ *Staley v. Turner*, 21 Mo. App. 244.

⁵ *Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412.

⁶ *Johnson v. Miller*, 69 Iowa, 562; 58 Am. Rep. 231.

malicious prosecution. Nor does their enmity toward the person arrested, nor their wish to drive him out of town.¹

And there is a material distinction between instituting a prosecution and merely attending a hearing upon a prosecution already commenced; and therefore where the defendants' agent, without their knowledge, had taken out a summons charging the plaintiff with stealing some of their cattle, and the only part the defendants took in the matter was to attend the hearing as prosecutors before the magistrate, it was held that no action would lie. "How can it be said," said Bramwell, J., "that they acted without reasonable cause in so attending? If they had said, before they heard a word of the evidence, 'We disavow the proceeding,' that surely would have been acting unreasonably; for it would have been acting precipitately, before they knew anything about the matter."² One who has consented to the use of his name as *prochein ami* in a suit by one being, or claiming to be, a minor is not liable if the suit was erroneously brought against his expectation, and without his consent, express or implied.³ Grand jurors are not liable to an action for information given by them to their fellow-jurors on which a presentment is founded.⁴ An infant is not liable for the malicious prosecution of a suit during his infancy where it was brought in his name by his *prochein ami*, and without his knowledge or authority, even though he expressly assented to the suit after he had knowledge of it.⁵ A prosecution which in the outset is not malicious, as, for instance, if undertaken at the dictation of a judge or magistrate, or spontaneously undertaken from having been commenced under a *bona fide* belief in the guilt of the accused,⁶ may nevertheless become malicious in any

¹ *Labar v. Batt*, 56 Mich. 589.

⁵ *Burnham v. Seaverns*, 101 Mass.

² *Weston v. Beeman*, 27 L. J. Ex. 360; 100 Am. Dec. 123.

57.

³ *Soule v. Winslow*, 66 Me. 447.

⁶ See *post*, § 1100, Liability for Judicial Error.

⁴ *Black v. Sugg*, Hardin, 556.

of the stages through which it has to pass if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres in the prosecution with the intention of maliciously procuring his conviction.¹ "Take, for instance," said Cockburn, C. J., in an interesting case on this subject,² "the case of a prosecutor who, after the commitment of a prisoner, and before going before the grand jury, chanced to discover the clearest proof of the prisoner's innocence, and yet went on with the indictment and prosecution, suppressing the newly ascertained facts, and supporting the case against the prisoner by evidence either absolutely false or rendered so by the suppression of facts which would have shown the innocence of the accused. Can it be said that to prefer an indictment under such circumstances, to be followed up by such a course of proceeding as I have referred to, would not be a malicious prosecution for which the man whose life or liberty had been put in peril by it should have a remedy by civil action?" Bramwell, J., in the same case, offered a similar illustration: "Suppose," said he, "a man's servants, on good ground, charge a person with stealing; suppose the charge is *bona fide* made, and the master bound over to prosecute; suppose another servant afterwards discovers the property under circumstances showing it was never stolen, and gives it to the master, who, for a grudge, nevertheless prefers an indictment and suppresses the evidence of innocence, — would no action lie? I cannot doubt it would; and yet the prosecutor would have given no evidence, and all his witnesses would have been truthful." But an allegation that a suit was maliciously commenced will not be supported by evidence which shows that the defendant brought his action believing that he had good cause therefor, but detained property attached, after learning that his suit was

¹ *Fitzjohn v. Mackinder*, 9 Com. B., N. S., 508; *Cole v. Curtis*, 16 Minn. 182. ² *Fitzjohn v. Mackinder*, 9 Com. B., N. S., 508.

groundless.¹ The action will likewise lie for advising and procuring a third person to institute a malicious prosecution without probable cause,² and against a judge for maliciously conspiring with others to institute in his court a malicious prosecution against the plaintiff.³ Proof that one maliciously made the affidavit in attachment, without showing further intervention on his part, will render him liable for the resulting injury.⁴

ILLUSTRATIONS. — A party went before a justice of the peace on Sunday, and made an affidavit upon which the justice issued an attachment, and appointed another party to execute it, who took the writ, and under it seized and carried away the goods of the defendant in the attachment. The defendant appeared before the justice, and procured a change of venue to another justice, but did not defend the attachment suit any further, but brought an action of trespass against the plaintiff in the attachment suit, the justice who issued it, and the appointed constable who served it. *Held*, that they were all liable, and that the right to bring the action of trespass was not waived by appearing and taking the change of venue in the attachment suit: *Thomas v. Hinsdale*, 78 Ill. 259.

¹ *Stone v. Swift*, 4 Pick. 389; 16 Am. Dec. 349.

² "It is said that in every case for malicious prosecution the defendant is charged with active agency, and that an action for merely advising another to institute a prosecution is not sustainable. For my part, I can conceive nothing more direct than the charge here. It is substantially a charge that the defendant maliciously, and without probable cause, consulted with, advised, and procured one Z., falsely and maliciously, and without probable cause, to prosecute the plaintiff for felony. This procurement is surely actionable. The language of the declaration corresponds with the form of declaring in an action on the case in the nature of an action for a conspiracy; and it was admitted in the argument that the facts set forth would be sufficient if proved, in an action against two or more to sustain such an action. If so, a charge of such advice and procurement by one can-

not less entitle the plaintiff to this action": Tucker P., in *Mowry v. Miller*, 3 Leigh, 561; 24 Am. Dec. 680; *Perdu v. Connerly*, 1 Rice, 49.

³ *Stewart v. Cooley*, 23 Minn. 347; 23 Am. Rep. 690.

⁴ *Walser v. Thies*, 56 Mo. 89, the court saying: "We are not willing to concede that it is necessary to the maintenance of the action that the defendant should in person deliver the writ to the officer, or be present and point out the property and tell him what to do. It is the duty of the court to deliver the process to its executive officer, and it is the duty of that officer to levy the attachments on whatever property may be necessary to satisfy the same. The plaintiff in the suit sets the whole proceeding in motion by making out the affidavit, and if he does the same maliciously, vexatiously, and without probable cause, and injury results from his unlawful and wrongful act, he is liable, and must respond in damages."

§ 1100. Liability of Prosecutor for Judicial Error.

— Where a person makes his complaint to a magistrate or other judicial officer, and the latter decides that it is a case for a criminal warrant, and issues it, the prosecutor is not liable, though it turn out that the charge did not constitute a crime, or that the person arrested is innocent.¹ And where one fairly discloses information to a prosecuting officer which results in a criminal prosecution, the party making the disclosure cannot be held liable for a malicious prosecution.² A person who states to the police his reasons for suspecting another of a felony, and his opinion that there is ground for the arrest of the suspected person, thereby causing the arrest of the latter, is not liable either in an action for malicious prosecution or for false imprisonment.³ Where A made an affidavit before a justice of the peace, stating that he had lost certain goods which he believed were concealed in the plaintiff's possession, and the justice thereupon issued his warrant for larceny, and the plaintiff was arrested and afterwards acquitted, it was held that A was not responsible.⁴ In another case, the plaintiff was a publican who dealt with the defendant as a brewer, and certain casks containing ale had been sent to the plaintiff's house. When they became empty, they were sent to the house of a third

¹ *Bennett v. Black*, 1 Stew. 494; *Milton v. Elmore*, 4 Car. & P. 456; *Carratt v. Morley*, 1 Gale & D. 275; *Wyatt v. White*, 5 Hurl. & N. 371; *Hahn v. Schmidt*, 64 Cal. 284; *Teal v. Fissel*, 28 Fed. Rep. 351; *Lark v. Bande*, 4 Mo. App. 186; *Sisk v. Hurst*, 1 W. Va. 53.

² *Smith v. Austin*, 49 Mich. 286; *Yocum v. Polly*, 1 B. Mon. 356; 36 Am. Dec. 583.

³ *Burns v. Erben*, 1 Rob. (N. Y.) 555.

⁴ *McNeely v. Driscoll*, 2 Blackf. 259, the court saying: "This affidavit shows a state of facts on which an action of trover might have been maintained, but it contains no charge of larceny against any person. The appellant had lost his property and wished to recover

it; he states that fact to a justice of the peace. The justice forms his judgment upon the facts stated; he issues his mandate to an officer to search for the property, and to bring the person in whose possession it may be found before himself or some other justice of the peace. This was an error; but it is the error of the justice, and not of the appellant. And if a justice of the peace, by mistake of judgment, conceives an act to be felony which is not felony, and, in consequence of that mistake, causes an innocent person to be arrested and imprisoned, the law will not hold the person who made the complaint responsible in this form of action for the consequences of such errors."

person. The defendant, on stating the facts to the magistrate, procured a warrant, under which the plaintiff was taken into custody. It was ruled that no action would lie.¹ In another case, the defendant had lost a bill of exchange, which he supposed was stolen. He went before a magistrate and related the facts and circumstances of the loss, and a warrant was issued to apprehend the plaintiff on the charge of having "*feloniously stolen and taken away*" the bill of exchange. The words in Italics were not used by the defendant, but were inserted in the warrant by the magistrate's clerk. The complaint being afterwards dismissed, it was held that the defendant was not liable.² In an action by T. against K. and others for malicious prosecution, it appeared that the prosecution complained of was set on foot by the defendants, and rested upon an affidavit drawn up by one of the defendants and verified by K., the other, wherein a larceny of deeds was charged to have been committed by T. from K.; but the facts and circumstances of the case were set forth, and showed that T., having persuaded K. to let him have possession of deeds from him to her of real estate (belonging to her, but the title to which was held by him in trust), for the purpose of examination and correction, refused to return them to her, but kept them by violence, and afterwards conveyed the real estate to another. It also appeared that at the time the deeds were not recorded.

¹ "There is no charge of felony contained in the information; it contains a state of facts certainly not amounting to felony, but for which an action of trover could be maintained. The defendant, having lost his property, states the facts to the magistrate, upon which he is to form his judgment. If the highest criminal judge of the land was, by mistake of judgment, to conceive that to be felony which did not amount to that offense, and to commit the party complained against, would that subject the party complaining to an action of this sort? I am of opinion

it ought not": Lord Eldon in *Leigh v. Webb*, 3 Esp. 165.

² "There was nothing in the defendant's conduct," said Abbott, C. J., "to show that he was influenced by malice. To support the averment of malice, it must be shown that the charge is willfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to a felony": *Cohen v. Morgan*, 6 Dow. & R. 8.

The New York court of appeals held that if the statement of surrounding circumstances in the affidavit were true, the action for malicious prosecution could not be sustained, even though the district attorney afterwards dismissed the indictment against T., after K. had been heard, as not sustained by the evidence. The affiant was responsible for the statements in her affidavit, but not for any legal conclusion therefrom of a police magistrate, or a district attorney, or a grand jury.¹ A master had given a servant into custody for stealing some clippers from his stable, and was sued for malicious prosecution. It was shown that all the master did was to state what he knew to the constable, whereupon the constable arrested the servant and charged him with the larceny. It was held that the master was not liable.² A prosecutor is not liable for an indictment brought in by the grand jury, if that body found it in disregard of his evidence; as would be the case were they to find an indictment for one offense, when the prosecutor's evidence before them was as to the commission of another.³ But the wrongful issue of the warrant must have not arisen from the fraud or falsehood of the prosecutor; a judicial error will still render him liable, if it appears that his statement has been untrue.⁴

In an English case, M. sued F. for a debt. F. claimed a set-off, in answer to which M. produced his ledger containing an acknowledgment signed, as he swore on the trial, by F. The latter denied the signature, which he averred to be a forgery; but the presiding judge, induced partly by M.'s testimony, and partly by F.'s conduct be-

¹ *Thaule v. Krekeler*, 81 N. Y. 428.

² *Danby v. Beardsley*, 43 L. T., N. S., 603, Lindley, J., saying: "It has been said that he so acted that he intended the constable to arrest the plaintiff, or as it has been said, to use a common phrase, he set the stone rolling. Now, what stone has he set rolling? It is simply a stone of suspicion. There was no direction to the constable to arrest and prosecute. He,

no doubt, suspected Danby, and described the things to the constable, but there is not the slightest evidence that the defendant either prosecuted or directed any one else to prosecute."

³ *Leidig v. Rawson*, 1 Scam. 272; 29 Am. Dec. 354.

⁴ *Dennis v. Ryan*, 65 N. Y., 385; 22 Am. Rep. 635; *Forrest v. Collier*, 20 Ala. 175; 56 Am. Dec. 190; *Farley v. Danks*, 4 El. & B. 493.

fore him, and disbelieving F.'s denial, on his own motion committed him for trial, and bound M. over to prosecute. F. was subsequently tried for perjury, and acquitted; and then brought an action against M. for malicious prosecution. The jury found that the entry had not been signed by F., and that M. knew this to be so. It was held that the action was maintainable, and that M. was liable.¹ The defense being that by mistake of the magistrate in drawing the affidavit the defendant was made to charge a dif-

¹ *Fitzjohn v. Magruder*, 8 Com. B., N.S., 78; 9 Com. B., N.S., 508. On the trial of this case, Williams, J., who presided, ordered a nonsuit on the ground that the action was not maintainable. In the common pleas, his ruling was sustained, on the ground that the committal of F. and the binding over of M. to prosecute were the acts of the judge alone, although he was in part influenced by the perjury and forgery of M. Willes, J., dissented, holding that the order ought not to aid M., because occasioned by his own contrivance and wrong, and because it was obtained by a fraud on the court, and was therefore void as a judicial act. But in the exchequer chamber, where the case was subsequently taken, the two lower courts were reversed and the action sustained, two judges dissenting. "It is beyond dispute," said Cockburn, J., "that independently of the county court judge, the prosecution would, under the circumstances, have been malicious. Called upon to answer in damages for the injury inflicted by it on the plaintiff, the defendant, in order to avoid the consequences of a proceeding on the face of it otherwise clearly wrongful and actionable, seeks to protect himself by showing that he acted under the order of the county court judge. I am disposed to concur with my brother Willes, who dissented from the majority of the court of common pleas, in thinking that it is not competent to the defendant to shelter himself under this order, seeing that the judge was induced to make it through his perjury and fraud. To suffer the judge to make such an order, without informing him

of the truth and disabusing his mind of the error into which he had been led by willful falsehood, was, as it seems to me, a fraud upon the judge, as well as a wrongful act towards the plaintiff; and I cannot bring myself to think that the defendant should be allowed to shelter himself under an order having its origin in his own falsehood, and issuing through his own fraud." The learned judge then referred to *Dubois v. Keats*, 11 Ad. & E. 329, where it was held that to an action for a malicious prosecution it was no answer that the defendant had been bound over by a magistrate to prosecute, where this was the result of the defendant's false and malicious charge, and continued: "I think the same principle may well be applied where a man, by his own perjury and fraud, and by an abuse of the confidence of the court, has led to his being appointed to prosecute one whom he knows to be innocent, when by a disclosure of the truth he might at once have prevented such a result. I doubt, therefore, whether we ought not to go the length of holding that the defendant, who, seeing that this order to prosecute was about to result from his own fraud and perjury, did not disabuse the mind of the judge, must be responsible for the order itself as much as though he had committed the perjury in order to procure it to be made. Without, however, going this far,—assuming that the defendant ought not to be held responsible for the act of the judge in directing the prosecution of the plaintiff.—I am still of opinion that the defendant is liable in this action."

ferent crime from that intended, the defendant may prove that the crime intended to be charged was true according to his belief.¹

ILLUSTRATIONS. — Defendant called plaintiff “a liar and thief,” and a justice of the peace, thinking a crime was charged, caused the arrest of plaintiff. *Held*, that defendant was not liable for the mistake of the justice: *Newman v. Davis*, 58 Iowa, 447. A caused B’s arrest upon a warrant for larceny. The justice, of his own motion, changed the charge of larceny to one of disorderly conduct, imposed a fine, and committed B in default of payment thereof. B sued A and the justice for malicious prosecution, trespass, and false imprisonment. *Held*, that A was not liable for anything done after the charge had been changed: *Frankfurter v. Bryan*, 12 Ill. App. 549. Plaintiff was committed for trial on a charge of arson, upon the information of the defendant and another witness. The latter alone deposed to the plaintiff being concerned in the commission of the offense. The defendant only swore as to the fact that the premises were burned, which was admittedly true. The informations were sent in due course to the crown solicitor of the county where the offense was alleged to have taken place, and the prosecution was taken up and conducted by the crown. The defendant was an active witness for the prosecution, and from him chiefly was obtained the information required by the crown in carrying on the prosecution. *Held*, that a belief by the defendant, upon reasonable grounds, in the guilt of the plaintiff at the time the case was sent for trial was a sufficient defense to the action, although such belief might not have in fact continued up to the trial of the plaintiff upon the criminal charge; and that if the defendant had formed, upon reasonable ground, a belief in the plaintiff’s guilt, and such belief continued up to the date at which the prosecution was taken up by the crown, and the defendant thereby lost all dominion over it, although the defendant afterwards changed his opinion as to the truth of the charge, no duty lay upon him towards the plaintiff to inform the public prosecutor of the alteration in the opinion which he had previously entertained: *Duane v. Barry*, 4 Law Rep. Ir. 742.

§ 1101. **Burden of Proof.** — The burden of proof of want of probable cause is upon the plaintiff; that is to say, want of probable cause will not be inferred from the

¹ *O’Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170.

mere failure of the prosecution.¹ The burden of proof of malice is also upon the plaintiff.²

§ 1102. **Law and Fact.**—The question of probable cause is for the court to decide,³ except where the facts are disputed, in which case the jury must decide.⁴ In short, the question of probable cause is a mixed question of law and fact: whether the circumstances do or do not show probable cause is a question of law; whether they did or did not exist is a question of fact.⁵ In Iowa it is held (con-

¹ *Besson v. Southard*, 10 N. Y. 236; *Boyd v. Cross*, 35 Md. 194; *Gnean v. R. R. Co.*, 51 Cal. 140; *Levy v. Brannan*, 39 Cal. 485; *Heyne v. Blair*, 62 N. Y. 19; *Good v. French*, 115 Mass. 201; *Wheeler v. Nesbitt*, 24 How. 444; *Wilkinson v. Arnold*, 11 Ind. 45; *Ames v. Snider*, 69 Ill. 376; *Thompson v. Lumley*, 50 How. Pr. 105; *McCormack v. Sisson*, 7 Cow. 715; *Mitchinson v. Cross*, 58 Ill. 366; *Thaule v. Krekeler*, 81 N. Y. 428; *Sutton v. Anderson*, 103 Pa. St. 151; *McFarland v. Washburn*, 14 Ill. App. 369; *Stewart v. Cole*, 46 Ala. 646; *Palmer v. Richardson*, 70 Ill. 544; *Davie v. Wisher*, 72 Ill. 262; *Calef v. Thomas*, 81 Ill. 478; *Morton v. Young*, 55 Me. 24; 92 Am. Dec. 565. And slight evidence held insufficient in *Mitchinson v. Cross*, 58 Ill. 366; and sufficient in *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644.

² *Dietz v. Langfitt*, 63 Pa. St. 234; *McKlown v. Hunter*, 30 N. Y. 625; *Fleckinger v. Wagner*, 46 Md. 581; *Purcell v. McNamara*, 9 East, 361; *Israel v. Brooks*, 23 Ill. 19; *Levy v. Brannan*, 39 Cal. 485; *Sappington v. Watson*, 50 Mo. 83; *Thaule v. Krekeler*, 81 N. Y. 428; *Frowman v. Smith*, Litt. Sel. Cas. 7; 12 Am. Dec. 265.

³ *McWilliams v. Hoban*, 42 Md. 56; *Speck v. Judson*, 63 Me. 207; *Cooper v. Waldron*, 50 Me. 80; *Sweet v. Negus*, 30 Mich. 406; *Chapman v. Cawrey*, 50 Ill. 512; *Thompson v. Force*, 65 Ill. 370; *Swaim v. Stafford*, 4 Ired. 392; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Wend. 424; *Howard v. Thompson*, 21 Wend. 319; 34 Am. Dec. 236; *Travis v. Smith*, 1 Pa. St.

234; 44 Am. Dec. 125; *Coleman v. Henrich*, 2 Mackey, 189; *Benton v. R. R. Co.*, 33 Minn. 189; *Eastin v. Bank*, 66 Cal. 123; 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575. It is not error to refuse an instruction implying that it is for the jury to determine what acts made the plaintiff liable to arrest: *Reno v. Wilson*, 49 Ill. 95. It is error to refuse to supplement instructions defining probable cause by telling the jury what acts constitute the crime for which plaintiff was prosecuted: *Meysenberg v. Engelke*, 18 Mo. App. 346.

⁴ *Humphries v. Parker*, 52 Me. 502; *Heyne v. Blair*, 62 N. Y. 19; *Travis v. Smith*, 1 Pa. St. 234; 44 Am. Dec. 125; *Cole v. Curtis*, 16 Minn. 182; *Sims v. McLendon*, 3 Strob. 557; *White v. Fox*, 1 Bibb, 369; 4 Am. Dec. 643; *Legget v. Blount*, N. C. 123; 7 Am. Dec. 702; *Heldt v. Webster*, 60 Tex. 207; *Donnelly v. Daggett*, 145 Mass. 314.

⁵ *Johnstone v. Sutton*, 1 Term Rep. 510; *Reynolds v. Kennedy*, 1 Wils. 232; *Panton v. Williams*, 1 Gale & D. 521; overruling *Isaac v. Brand*, 2 Stark. 168, and *Brooks v. Warwick*, 1 Gale & D. 521; *Busst v. Gibbons*, 30 L. J. Ex. 160; *Thaule v. Krekeler*, 81 N. Y. 428; *Nash v. Orr*, 3 Brev. 94; 5 Am. Dec. 547; *Cole v. Curtis*, 16 Minn. 182; *Horn v. Boon*, 3 Strob. 307; *Lunda v. Obert*, 45 Tex. 539; *Stone v. Crocker*, 24 Pick. 81; *McCormick v. Sisson*, 7 Cow. 715; *Burlingame v. Burlingame*, 8 Cow. 141; *Murray v. Long*, 1 Wend. 140; *Pangburn v. Bull*, 1 Wend. 345; *Hall v. Suydam*, 6 Barb. 83; *Weaver v. Townsend*, 14 Wend. 192; *Besson v. Southard*, 10 N. Y. 236; *Thompson*

trary to the weight of authority) that the proper practice is to instruct the jury as to what constitutes probable cause in law, and then leave them to apply the facts thereto, and to find therefrom whether probable cause is or is not proved.¹ In California, the appellate court will reverse where plaintiff in an action for malicious prosecution was nonsuited on the ground that want of probable cause for the prosecution was not shown, if there was evidence of want of probable cause which should have been submitted to the jury.² The jury should be distinctly told whether, the facts being found, probable cause is or is not proved.³ Where the circumstances relied on as evidence of prob-

v. Lumley, 50 How. 105; *Dietz v. Langfitt*, 63 Pa. St. 234; *Driggs v. Benton*, 44 Vt. 124; *Harkrader v. Moore*, 44 Cal. 144; *Ulmer v. Leland*, 1 Me. 135; 10 Am. Dec. 48; *Crabtree v. Horton*, 4 Munf. 59; *Maddox v. Jackson*, 4 Munf. 462; *Munns v. Dupont*, 3 Wash. C. C. 31; *Boyd v. Cross*, 35 Md. 194; *Hill v. Palm*, 38 Mo. 13; *Plummer v. Green*, 3 Hawks, 66; 14 Am. Dec. 572; *Miller v. Brown*, 3 Mo. 127; 23 Am. Dec. 693; *French v. Smith*, 4 Vt. 363; 24 Am. Dec. 616; *Walbridge v. Purden*, 102 Pa. St. 1; *Travis v. Smith*, 1 Pa. St. 237; 44 Am. Dec. 125, the court saying: "As the authority to institute a criminal prosecution and the extent of that authority are derived from the law, the law must judge of its exercise; it is therefore the duty of the court to determine whether the proof of certain facts constitutes probable cause, and it is error to submit that question to the jury. The duty of the jury is to say what facts are proved, and for that purpose they are to decide on the weight of evidence, the credibility of witnesses, the truth of conflicting allegations. The general question of probable cause is then a mixed question of law and fact, composing two distinct inquiries, both conducted at the same time on a jury trial, but yet cognizable before two distinct tribunals, each of which discharges its proper functions."

¹ *Shaul v. Brown*, 28 Iowa, 37; 4 Am. Rep. 151.

² *Simmons v. Brinkmeyer*, 72 Cal. 486.

³ *Ulmer v. Leland*, 1 Me. 135; 10 Am. Dec. 48; *Bulkeley v. Smith*, 2 Duer, 261; *Bulkeley v. Keteltas*, 6 N. Y. 384; but see *Caldwell v. Bennett*, 22 S. C. 1. In *Masten v. Deyo*, 2 Wend. 424, the judge told the jury that he was inclined to believe there was evidence enough given of probable cause to protect the defendant, but left it to them to decide. On appeal this was held to be error. "The judge erred," said *Marcy, J.*, "in not giving the defendant the benefit of his exposition to the jury of the law relative to what constituted probable cause in an action for a malicious prosecution. He should not have taken the cause from the jury if there was the least doubt as to the existence of the circumstances alleged as the probable ground of the criminal proceedings against the plaintiff, but he ought to have instructed them as to the law involved in the question, and as to what constituted a legal excuse for the defendant, and also whether the facts relied on in the defense, on the supposition that they should be found true by them, made out a probable cause. It was the defendant's right to have the jury instructed in their duty by the opinion of the court upon the question of law. This was not done; on the contrary, it would seem that both the law and the fact were left, without any instruction from the judge, at the entire disposition of the jury."

able cause are admitted by the pleadings, the court must pass upon them; and if they are clearly established by uncontroverted testimony or by stipulation, and in the opinion of the court they make out probable cause, he may properly order a nonsuit.¹ Where the testimony of the plaintiff discloses probable cause, or no probable cause, for his arrest, it is the duty of the court to so instruct the jury, and direct a verdict for the defendant or plaintiff, as the case may be.² But if the facts are controverted, and the evidence is conflicting, the case must go to the jury.³

Whether the prosecutor acted *bona fide* upon the opinion of his counsel, believing he had a good cause of action, is a question for the jury;⁴ or whether the statement to the counsel was a full and fair statement;⁵ or whether the attorney was a proper adviser.⁶

The question of malice is always one for the jury.⁷

¹ Masten v. Deyo, 2 Wend. 424; Emerson v. Skaggs, 52 Cal. 246.

² Sutton v. Anderson, 103 Pa. St. 151; Parli v. Reed, 30 Kan. 534.

³ Masten v. Deyo, 2 Wend. 424; Crabtree v. Horton, 4 Munf. 59; Maddox v. Jackson, 4 Munf. 462; Hardaway v. Manson, 2 Munf. 230; Heyne v. Blair, 62 N. Y. 19.

⁴ Ravenga v. Mackintosh, 2 Barn. & C. 693; Hall v. Suydam, 6 Barb. 83; Potter v. Seale, 8 Cal. 217; Thompson v. Lumley, 50 How. Pr. 108; Anderson v. Friend, 71 Ill. 475.

⁵ McLeod v. McLeod, 73 Ala. 42.

⁶ Watt v. Corey, 76 Me. 87.

⁷ Mitchell v. Jenkins, 5 Barn. & Adol. 588; Ritchey v. Davis, 11 Iowa, 124; Newell v. Downs, 8 Blackf. 523; Potter v. Seale, 8 Cal. 217; Cloon v. Gerry, 13 Gray, 201; Levy v. Brannan, 39 Cal. 485; Von Latham v. Libby, 38 Barb. 389; Besson v. Southard, 10 N. Y. 236; Masten v. Deyo, 2 Wend. 424; Closson v. Staples, 42 Vt. 209; 1 Am. Rep. 316; Wagstaff v. Shippel, 27 Kan. 450; Gee v. Culver, 12 Or. 228. It must be left to the jury in every case. In Mitchell v. Jenkins, 5 Barn. & Adol. 588, a credi-

tor had caused his debtor to be arrested for the sum of forty-five pounds, knowing that there was a set-off to the amount of sixteen pounds. He instructed the officer who made the arrest to allow the set-off in case the debtor would settle. The debtor subsequently brought an action for malicious prosecution. On the trial, Taunton, J., ruled that there was no probable cause, and that there was malice in law, as the act of causing the plaintiff's arrest for a larger sum than he owed was wrongful, and he told the jury that the only question for them was the amount of damages. On appeal, a new trial was granted: "Malice," said Denman, C. J., "may, in some instances, be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." Said Parke, J., in the same case:

ILLUSTRATIONS. — One S. daubed defendant's fence with paint, and told his wife that it had been done by plaintiff and her sister. He afterwards told defendant that it was not done by them, but by himself. Subsequently, defendant procured a warrant against plaintiff and her sister for malicious mischief, and they were tried before a police justice and the complaint dismissed. It appeared that defendant had agreed to settle the matter with S. *Held*, that it was a question for the jury whether defendant had probable cause for procuring the warrant: *Foote v. Milbier*, 1 Thomp. & C. 456; 45 How. Pr. 38. N., a school-teacher, procured from F., one of the trustees, an order upon the district collector, upon the express agreement that it should not be presented until signed by the other trustees. N., without procuring the other signatures, got the money from the collector by falsely stating that he had shown the order to another trustee, who said that it was all right. Thereupon F. procured N.'s arrest for obtaining money by false pretenses. In an action by N. for malicious prosecution, *held*, that whether or not there was a reasonable cause for procuring the arrest was a question for the jury: *Neil v. Thorn*, 17 Hun, 144. A, while attending a fair, left his buggy near the fair-grounds, and upon searching for it could not find it, and was told by persons on the ground that B had hitched his horse to it and driven off, and that B was a hard case. A afterwards made numerous inquiries for the buggy, but could hear nothing of it, and was then advised by counsel that the act of B was larceny, and he should procure a warrant for B's arrest. The warrant was obtained and placed in the hands of a constable. A was afterwards told that B denied having taken the buggy, and claimed that it was taken by a servant of his (B's) brother. A afterwards found the buggy on the fair-grounds. *Held*, that the question of probable cause was for the jury: *Lawyer v. Loomis*, 3 Thomp. & C. 393.

§ 1103. **Evidence.** — Whatever was admissible to defeat the action in which the arrest was made is likewise

"When there is no reasonable or probable cause, it is for the jury to infer malice from the facts found. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case where there are mutual accounts be-

tween parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious. For example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious." *Patteson and Taunton, JJ.*, concurred.

admissible on the question of the right of the party arrested to recover for the injury sustained.¹ The plaintiff need not give in evidence all the evidence given before the magistrate. He must prove his case, but this does not necessarily require him to show everything that took place on the former proceedings.² The finding of the magistrate on the preliminary examination introduced as evidence of probable cause cannot be impeached by showing that he acted unfairly or improperly in the examination.³ The magistrate may testify as to what the testimony before him on the preliminary examination was.⁴ The official stenographer of the court may read from his notes the testimony of a witness taken at the trial of the indictment, and who was beyond the jurisdiction of the trial court, for the purpose of showing want of probable cause.⁵ It is not competent to call one who acted as juror on the trial, and ask him if the jury deliberated upon the charge, and on what grounds.⁶

On the question of malice and probable cause, the following are relevant and admissible, viz.: Statements made by third persons to the defendant;⁷ what was testified to upon the criminal trial, though such testimony was there

¹ Hadden v. Mills, 4 Car. & P. 486.

² Bacon v. Towne, 4 Cush. 217. A was arrested for larceny at the instance of B, and on being discharged, brought an action for malicious prosecution against him. It was held that A may prove that B was present when two witnesses swore before a magistrate to facts showing that the larceny was not committed by A; and the record of proceedings before the magistrate need not be produced: Watt v. Greenlee, 2 Hawks, 186.

³ Bacon v. Towne, 4 Cush. 217.

⁴ Bacon v. Towne, 4 Cush. 217. The answer of the justice who issued the warrant of arrest to a question asked by the defendant as to what he (the justice) thought of the plaintiff, and whether he was not subject to the vagrant law, is admissible in evidence

as a part of the *res gestæ*: Williams v. Vanmeter, 8 Mo. 339; 41 Am. Dec. 644. In an action for malicious prosecution, the evidence showed that the prosecution was dismissed by the justice. The defendant cannot introduce evidence as to what he himself stated at the time the prisoner was discharged as the reason of the failure in the prosecution: McCausland v. Wonderly, 56 Ill. 410.

⁵ Brown v. Willoughby, 5 Col. 1.

⁶ Scott v. Shelor, 28 Gratt. 891. A grand jurymen was asked whether the evidence of defendant, then the prosecuting witness, was considered by the jury. It was held improper, as the jurymen could not tell what the jury considered, but only what they said: Parkhurst v. Masteller, 57 Iowa, 474.

⁷ French v. Smith, 4 Vt. 363; 24 Am. Dec. 616.

incompetent;¹ that defendant had received information from a reliable source which induced him to cause the arrest of the plaintiff, and what that information was, and declarations made to him by others, and reports in circulation;² the proceedings of the court in the prosecution;³ hostility and unfriendly feeling entertained by defendant towards plaintiff prior to the alleged prosecution;⁴ the previous personal relations of the parties, and that the defendant had said he was not personally cognizant of the matters on which he had based the prosecution, and that plaintiff did not commit the crime;⁵ that the defendant, at the time when he instituted the prosecution complained of, believed that the claim on which it was founded was a valid and legal claim against the plaintiff;⁶ that the plaintiff was guilty as charged;⁷ facts tending to show that what the defendant did was done without malice, and that he had a right to suppose that there was reasonable cause for his action;⁸ in an action for the malicious prosecution of G. for burning H.'s barn, evidence that, pending the same, H. attached G.'s property and detained it in his (H.'s) possession, so, also, evidence that H. actively assisted the officer arresting G. in procuring evidence of the size of G.'s boots and tracks.⁹ One sued for a malicious prosecution may testify that he was not prompted by ill-will or by malice.¹⁰ And the following have been held irrelevant and inadmissible: The fact that plaintiff was a minor when the assault and battery was committed on which the alleged malicious prosecution was brought;¹¹ or defendant's social position;¹² or that defendant endeavored to find out plaintiff's domicile, to

¹ *McMahan v. Armstrong*, 2 Stew. & P. 151; 23 Am. Dec. 304.

² *Lamb v. Galland*, 44 Cal. 609.

³ *Dreux v. Domec*, 18 Cal. 83.

⁴ *Bruington v. Wingate*, 55 Iowa, 140.

⁵ *Patterson v. Garlock*, 39 Mich. 447.

⁶ *Garrett v. Mannheimer*, 24 Minn. 193.

⁷ *Bruley v. Rose*, 57 Iowa, 651.

⁸ *Bradner v. Faulkner*, 93 N. Y. 515; *Vansickle v. Brown*, 68 Mo. 627.

⁹ *Gifford v. Hassam*, 50 Vt. 704.

¹⁰ *McCormack v. Perry*, 47 Hun, 71.

¹¹ *Motes v. Bates*, 74 Ala. 374.

¹² *Renfro v. Prior*, 22 Mo. App. 403.

inform him of the attachment and prevent a sacrifice sale of the goods.¹ In an action for a vexatious suit and malicious holding to bail, the records of other actions brought by the same defendant against the plaintiff cannot be given in evidence.²

§ 1104. **Damages.**—In an action for malicious prosecution, indemnity is awarded for all the injury to reputation, feelings, health, mind, and person caused by the arrest of the plaintiff;³ also for the injury to his fame and reputation occasioned by the false accusation.⁴ The attorney fees expended in the defense of the malicious suit are recoverable as a part of the damage for such an action;⁵ but the attorney fees expended for bringing the action for damages on account of the malicious suit is no part of the damages.⁶ Where defendant on an *ex parte*

¹ *Scovill v. Glasner*, 79 Mo. 449.

² *Ray v. Law*, Pet. C. C. 207.

³ *Fagnan v. Knox*, 40 N. Y. Sup. Ct. 41; *McWilliams v. Hoban*, 42 Md. 56.

⁴ *Sheldon v. Carpenter*, 4 N. Y. 579; 55 Am. Dec. 301.

⁵ *McCardle v. McGinley*, 86 Ind. 538; 44 Am. Rep. 343; *Marshall v. Bettner*, 17 Ala. 832; *Ziegler v. Powell*, 54 Ind. 173; *Gregory v. Chambers*, 78 Mo. 294; *Fagnan v. Knox*, 40 N. Y. Sup. Ct. 41.

⁶ *Stewart v. Sonneborn*, 98 U. S. 197; *Good v. Mylin*, 8 Pa. St. 51; 49 Am. Dec. 493; *Alexander v. Herr*, 11 Pa. St. 537; *Stopp v. Smith*, 71 Pa. St. 285; *Hicks v. Foster*, 13 Barb. 663. In *Landa v. Obert*, 45 Tex. 539, the court say: "There is unquestionably some conflict in the decisions. And we readily admit that some of the earlier decisions of this court tend in some degree to maintain the proposition that when fraud or malice are of the gist of plaintiff's action, he may recover his counsel fees in prosecuting the suit as part of his damages. But while we do not mean to intimate that there are no cases in which the plaintiff may be entitled to their recovery, he is only entitled to do so,

as we think, where they are a part of the damages resulting as the natural and proximate consequence of the act complained of: *Hicks v. Foster*, 13 Barb. 663. In *Lincoln v. R. R. Co.*, 23 Wend. 425, Chief Justice Nelson, in delivering the opinion of the court, remarks: 'The charge as to expenses beyond taxable costs and counsel fees in conducting the suit as a specific item of damages to be taken into account, I am inclined to think was erroneous. These have been fixed by law which is as applicable in damages as in debt.' And in *Day v. Woodworth*, 13 How. 363, while vindicating the principle allowing the jury to give exemplary, punitive, or vindictive damages in certain cases, Green, J., says: 'That while damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, these fees cannot be taken as the measure of punishment, or as a necessary element in its infliction. As has been well remarked, if the plaintiff is to recover damages for his counsel fees when he succeeds, he ought to pay the defendant like fees when he fails in his suit; the law, however, entitles the defendant to no such redress': 13 How. 368. In

application had by means of an injunction kept plaintiff out of certain coal lands for a year, the measure of damages was held to be the value of the use of the property for business.¹ In an action for maliciously holding the plaintiff to bail upon a *ne exeat*, the plaintiff may give evidence that he has suffered in the public estimation in consequence of the process of *ne exeat*. But he cannot show such injury in consequence of reports circulated by the defendant, although such reports may be given in evidence to show malice in the defendant.²

Punitive damages may be assessed in an action for malicious prosecution if actual malice is shown, or a design to injure plaintiff, or fraud and oppression.³ If the jury find that the prosecution originated without probable cause, and in malice, they may find that in continuing it the defendant acted in the same manner, and may give punitive damages.⁴ The pecuniary circumstances

Stepp v. Smith, 71 Pa. St. 286, the supreme court of Pennsylvania reaffirm the case of *Good v. Mylin*, 8 Pa. St. 57, 49 Am. Dec. 493, which expressly overrules *Wirt v. Vickers*, 8 Watts, 227, and *Rogers v. Falls*, 8 Pa. St. 159, and holds it clearly erroneous to instruct the jury in case of tort to include in their verdict expenses incurred in establishing plaintiff's right. 'So to charge,' says the court, 'was to forget that only such damages could be recovered as arose out of the injury; and not to allow them as a consequence of bringing the suit. This is wrong in logic as well as in law.' In *Howell v. Scroggins*, 48 Cal. 356, the court below had instructed the jury that they were not limited in assessing damages to mere compensation, but might give exemplary damages, and could take into consideration plaintiff's expenses in prosecuting the suit. The court, after a review of the general current of decisions on the subject, were reluctantly compelled to reverse the judgment. It says: 'The damages found by the jury were not excessive, and if we could feel at lib-

erty to disregard the error of the court below, or were satisfied that it did not influence the action of the jury, we should affirm the judgment.' In *Earle v. Tupper*, 45 Vt. 283, the court say: 'The great weight of authority seems to be opposed to the allowance of counsel fees as an element of damages, even in cases proper for exemplary damages. At least there is so much authority that way that this court is at liberty to disregard these the other way, if necessary, to follow the rule most in accordance with legal principles and sound reason.' See also *Hoadly v. Watson*, 45 Vt. 289; 12 Am. Rep. 197; *Barnard v. Poor*, 21 Pick. 282; *Fairbanks v. Winter*, 18 Wis. 287; 86 Am. Dec. 765; *Stimpson v. R. R. Co.*, 1 Wall. Jr. 167."

¹ *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

² *Zantzing v. Weightman*, 2 Cranch C. C. 478.

³ *Vinal v. Cove*, 18 W. Va. 1; *McWilliams v. Hoban*, 42 Md. 56.

⁴ *Cooper v. Utterbach*, 37 Md. 283.

of the defendant may be considered in determining the amount of the damages.¹ Evidence that plaintiff was confined apart from his wife, who was also arrested, is admissible, even though such separation was legal.² The fact that plaintiff might, in the criminal proceeding, have shortened his imprisonment by availing himself of the preliminary examination need not be considered as a ground for reducing damages, unless there is affirmative proof that his motive in waiving examination and exposing himself to continued imprisonment was to enhance damages.³ Declarations of the plaintiff prior thereto and tending to provoke the prosecution are inadmissible in mitigation of the actual damages sustained, but are admissible to mitigate the damages for the indignity and the punitive damages claimed.⁴ The fact that plaintiff's wife was made sick by reason of the arrest is too remote for special damage.⁵ Plaintiff cannot recover for a conversion of the goods attached.⁶ Where evidence was admitted, upon the question of damages, of the appointment of a receiver, after the vacation of the attachment, upon plaintiff's own election, and the consequent sacrifice of the property, this was held too remote, though plaintiff may have been induced to take this course by his creditors.⁷

In an action against two defendants for malicious prosecution, a severance of the damages in the verdict is a ground for a reversal and a new trial.⁸ The jury are the proper judges of the amount of damages, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice, or

¹ Bull. N. P. 13; *Whitfield v. Westbrook*, 40 Miss. 311; *Wiin v. Peckham*, 42 Wis. 493.

² *Spear v. Hiles*, 67 Wis. 350.

³ *King v. Colvin*, 11 R. I. 582.

⁴ *Prentiss v. Shaw*, 56 Me. 427; 96 Am. Dec. 475.

⁵ *Hampton v. Jones*, 58 Iowa, 317.

⁶ *Burton v. R. R. Co.*, 33 Minn. 189.

⁷ *Cochrane v. Quackenbush*, 29 Minn. 376.

⁸ *McCool v. Mahoney*, 54 Cal. 491.

some improper motive, the court will not interfere to disturb their verdict.¹

¹ *Chapman v. Dodd*, 10 Minn. 350; *Ross v. Inness*, 35 Ill. 487; 85 Am. Dec. 373. A bid off certain property of B, his debtor, at a sale on execution, took actual possession thereof, and put it into the hands of an agent for sale, under an arrangement with B that it should be sold, and that any balance remaining after satisfying the execution, etc., should be paid to B. Before the property was sold, however, B broke into the place where it was kept, and removed and disposed of a part of it. A thereupon, after consulting highly reputable and able lawyers,

and acting upon their advice, had B arrested for larceny, but, after being confined a few hours only, he gave bail and was released, and the grand jury found no bill against him. In an action against A for malicious prosecution, held that a verdict of ten thousand dollars was outrageously excessive, and that a *remittitur* of four thousand dollars did not remove the element of prejudice, passion, or misconception which must have influenced the jury in making up their verdict: *Loewenthal v. Strong*, 90 Ill. 74.

TITLE XIII.

WRONGS IN DOMESTIC RELATIONS.

TITLE XIII.

WRONGS IN DOMESTIC RELATIONS.

CHAPTER LVI.

CRIMINAL CONVERSATION AND SEDUCTION

- § 1105. Interference with marital rights — Criminal conversation.
- § 1106. Defenses.
- § 1107. Damages.
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- § 1109. Interference with parental rights — In general.
- § 1110. Seduction defined — Elements of.
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§ 1105. Interference with Marital Rights — Criminal Conversation. — An action lies by the husband against any one who seduces or entices his wife away from him.¹ The ground of such an action is the infliction upon the

¹ *Sanborn v. Neilson*, 5 N. H. 314; *Winsmore v. Greenbank*, Willes, 577; *Weedon v. Timbrell*, 5 Term Rep. 357; *Rabe v. Hanna*, 5 Ohio, 530; *Preston v. Bowers*, 13 Ohio St. 1; 82 Am. Dec. 430; *Hadley v. Heywood*, 121 Mass. 236; *Barbee v. Armstead*, 10 Ired. 530; 51 Am. Dec. 404; *Cröse v. Rutledge*, 81 Ill. 266; *Conway v. Nicol*, 34 Iowa, 533; *Van Vacter v. McMillip*, 7 Blackf. 578; *Wood v. Matthews*, 27 Iowa, 409; *Ferguson v. Smithers*, 70 Ind. 519; 36 Am. Rep. 186; *Egbert v. Greenwalt*, 44 Mich. 245; 38 Am. Rep. 200.

husband of some one or more of the following injuries: 1. Dishonor of the marriage-bed; 2. Loss of the wife's affections; 3. Loss of the comfort of the wife's society; 4. Total loss of the wife's services where she absconds from the husband, and probable diminished value of services where she does not; 5. The mortification and sense of shame that most usually accompany this domestic wrong.¹ But the *gravamen* of an action for criminal conversation is the seduction; hence if this is not proved, the plaintiff in such an action cannot recover for the loss of his wife's society.² So the plaintiff must prove an actual marriage; proof of reputation and cohabitation is not sufficient;³ and if there has been a voluntary separation, no action lies for a subsequent seduction of the wife.⁴

Any interference with the domestic rights of the husband is also actionable. Thus where a complaint charged the defendant with wickedly and wrongfully, etc., contriving to alienate the affections of the plaintiff's wife from him, and with persuading and inducing her to refuse to acknowledge and receive him as her husband, whereby he had wholly lost and been deprived of the comfort, fellowship, society, aid, and assistance of his wife in his domestic affairs, it was held that a sufficient cause of action was stated.⁵ An action for alienating a wife's affections is maintainable without proof of debauching her or enticing her

¹ Cooley on Torts, 224.

² Wood v. Matthews, 47 Iowa, 409.

³ Catherwood v. Caston, 13 Mees. & W. 261; Hutchins v. Kinnell, 31 Mich. 126; 18 Am. Rep. 164; Dann v. Kingdom, 1 Thomp. & C. 492; Kibby v. Rucker, 1 A. K. Marsh. 391; Keppler v. Elser, 23 Ill. App. 643. The marriage may be proved by witnesses as well as the record: Kilburn v. Mullen, 22 Iowa, 503; or by the plaintiff and his wife: Jacobsen v. Siddal, 12 Or. 280; 53 Am. Rep. 360. Declarations of the defendant that he knew A was married to the plaintiff, and

that, with full knowledge of that fact, he had debauched her, are admissible in evidence in proof of the marriage: Forney v. Hallacher, 8 Serg. & R. 159; 11 Am. Dec. 590. *Contra*, Dann v. Kingdom, 1 Thomp. & C. 492.

⁴ Weedon v. Timbrell, 5 Term Rep. 357; Fry v. Derstler, 2 Yeates, 278. See Chambers v. Caulfield, 6 East, 245. A husband may maintain an action of criminal conversation, although the intercourse took place after his final separation from his wife, and after a divorce for his cruelty: Michael v. Dunkle, 84 Ind. 544; 43 Am. Rep. 100.

⁵ Hermance v. James, 47 Barb. 120.

away.¹ One who secretly sold laudanum to a wife, which she used as a beverage, whereby her health was greatly impaired, was held liable to the husband as being guilty of assisting her in the violation of her duty as wife.² The intent to seduce a wife is an aggravation of a trespass, as well as an actual seduction would be.³ A husband may maintain an action for enticing away his wife, or inducing her to live apart from him, even against the wife's father.⁴ But the case of a wife's parents merely harboring or protecting her after she has left her husband will not be an enticing from him, and will not render them liable.⁵ But whenever a wife is not justifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie.⁶ In short, for an injury to the wife, either intentionally or negligently caused, which deprives her of the ability to perform services, or lessens that ability, the husband may maintain an action for the loss of service, and also for any incidental loss or damage, such as moneys expended in care and medical treatment, and the like.⁷

A wife may maintain an action for the loss of the society and companionship of her husband against one who wrongfully induces and procures her husband to abandon or send her away. But the acts of defendant causing the injury must have been malicious.⁸

¹ *Reinehart v. Bills*, 82 Mo. 534; 52 Am. Rep. 385.

² *Hoard v. Peck*, 56 Barb. 202.

³ *Matteson v. Curtis*, 11 Wis. 424.

⁴ *Bennett v. Smith*, 21 Barb. 439; *Hutcheson v. Peck*, 5 Johns. 196; *Barbee v. Armstead*, 10 Ired. 530; 51 Am. Dec. 404; *Friend v. Friend*, Wright, 639.

⁵ *Friend v. Thompson*, Wright, 636; *Burnett v. Burkhead*, 21 Ark. 77; 76 Am. Dec. 358; *Turner v. Estes*, 3 Mass. 317; *Rabe v. Hanna*, 5 Ohio, 530.

⁶ *Barnes v. Allen*, 30 Barb. 663; *Phipps v. Squire*, Peake, 82. One who receives a wife to his home who

was treated with cruelty by the husband cannot recover from her husband for her support, if one of his motives in receiving her was to facilitate adulterous intercourse: *Almy v. Wilcox*, 110 Mass. 443.

⁷ *Matteson v. R. R. Co.*, 35 N. Y. 487; *Smith v. St. Joseph*, 55 Mo. 456; 17 Am. Rep. 660; *Berger v. Jacobs*, 21 Mich. 215; *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670; *Atlantic etc. R. R. Co. v. Hopkins*, 94 U. S. 11.

⁸ *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Clark v. Harlan*, 1 Cin. Rep. 418; but see *Lynch v. Knight*, 9 H. L. 577.

§ 1106. **Defenses.**—That the husband was privy to or connived at the intercourse is a good defense;¹ or that he permitted her to follow the life of a prostitute.² But mere negligence or indifference is no bar;³ or that the husband was cruel to his wife;⁴ or that, at and before the seduction charged, no affection existed between the plaintiff and his wife.⁵ The woman's consent is no defense, and the fact that the wife is subsequently divorced is no bar to the action;⁶ nor is the fact that the intercourse was accomplished with violence, and against her consent;⁷ nor that there was no actual loss of the wife's services.⁸ It is no bar to the action that, since the cause of action accrued, the wife has obtained a divorce from the plaintiff;⁹ nor that the husband has forgiven or condoned the adultery with the defendant.¹⁰

ILLUSTRATIONS. — A wife obtained a divorce, the husband making no defense. He afterwards sued A for criminal conversation with his wife, alleging an act as known to him before the divorce suit. *Held*, that the suit against A was barred by the decree in the divorce suit: *Gleason v. Knapp*, 56 Mich. 291; 56 Am. Rep. 388.

§ 1107. **Damages.** — The extent of the damages to be awarded will depend on the previous relations of the husband and wife: if they were cordial and affectionate, his injury would be great; if otherwise, his injury would be consequently small.¹¹ But the husband cannot recover

¹ *Bennett v. Allcott*, 2 Term Rep. 168; *Winter v. Henn*, 4 Car. & P. 494; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539; *Bunnell v. Greathead*, 49 Barb. 106; but see *Sanborn v. Neilson*, 4 N. H. 501.

² *Sherwood v. Titman*, 55 Pa. St. 77; *Cook v. Wood*, 30 Ga. 891; 76 Am. Dec. 677.

³ *Bunnell v. Greathead*, 49 Barb. 106.

⁴ *Hadley v. Heywood*, 121 Mass. 236.

⁵ *Dallas v. Sellers*, 17 Ind. 479; 79 Am. Dec. 489.

⁶ *Wales v. Miner*, 89 Ind. 118.

⁷ *Bigaouette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307; *Egbert v. Greenwalt*, 44 Mich. 245; 38 Am. Rep. 260.

⁸ *Bigaouette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307; *Jacobsen v. Siddal*, 12 Or. 280; 53 Am. Rep. 360.

⁹ *Wood v. Matthews*, 47 Iowa, 409; *Michael v. Dunlap*, 84 Ind. 544; 43 Am. Rep. 100.

¹⁰ *Verholf v. Van Honwenlengen*, 21 Iowa, 429; *Stumm v. Hummel*, 39 Iowa, 478; *Clouser v. Clapper*, 59 Ind. 548.

¹¹ *Cooley on Torts*, 224; *Hadley v. Heywood*, 121 Mass. 236. "Any un-

any damages for the injury to the happiness and reputation of his children or "family."¹ The damages are in the discretion of the jury, with which the court will not interfere.² Evidence of the pecuniary condition of the parties is admissible.³ The circumstances of the connection, viz., whether the wife was importuned by her par amour, or whether she sought or threw herself in his way, whether she was overcome by persuasion, or gave herself away willingly, are admissible in evidence in the question of damages.⁴ The bad character of the husband will not mitigate damages, unless he be guilty of infidelity or other wrong to the wife herself.⁵ But in mitigation of damages it has been held admissible to show that the plaintiff was cruel to his wife;⁶ that she was a bad character;⁷ that the marriage was not one of affection, and had not ripened into love.⁸ Where loss of service is alleged in aggravation of damages, the failure to prove the same does not defeat the right to recover damages for the mental anguish of the husband in the dishonor of his bed, etc.⁹

happy relations existing between the plaintiff and his wife not caused by the conduct of the defendant may affect the question of damages, and were properly submitted to the jury; but they were in no sense a justification or palliation of the defendant's conduct. They are not allowed to affect the damages because the acts of the defendant are less reprehensible, but because the conduct of the husband is such that the injury which acts occasion is less than otherwise it might have been."

¹ *Ferguson v. Smethers*, 70 Ind. 519; 36 Am. Rep. 186.

² *Torre v. Summers*, 2 Nott & McC. 267; 10 Am. Dec. 597;

³ *Rea v. Tucker*, 51 Ill. 112; 99 Am. Dec. 539; *Peters v. Lake*, 66 Ill. 203; 16 Am. Rep. 593. Proof of the plaintiff's bankruptcy at the time of the trial is inadmissible on the amount of exemplary damages proper to be re-

covered: *Peters v. Lake*, 66 Ill. 206; 16 Am. Rep. 593.

⁴ *Ferguson v. Smethers*, 70 Ind. 519; 36 Am. Rep. 186.

⁵ *Norton v. Warner*, 9 Conn. 172; *Shattuck v. Hammond*, 46 Vt. 466; 14 Am. Rep. 631; *Van Vacter v. McKillip*, 7 Blackf. 578. The plaintiff's general character is not in issue, but only his character as a husband: *Norton v. Warner*, 9 Conn. 172.

⁶ *Coleman v. White*, 43 Ind. 429.

⁷ *Harter v. Crill*, 33 Barb. 283. Proof of misconduct of the wife prior to her actual intercourse with the defendant may be given, although after the time when familiarities were proved to have taken place between the wife and the defendant: *Torre v. Summers*, 2 Nott & McC. 267; 10 Am. Dec. 597; *Davenport v. Russell*, 5 Day, 149.

⁸ *Dauce v. McBride*, 43 Iowa, 624.

⁹ *Yundt v. Hartrunft*, 41 Ill. 10.

§ 1108. **Evidence.**—In an action for enticing away the plaintiff's wife, the declarations of the wife are not admissible in evidence.¹ The confessions of the wife in an action by the husband against her seducer are not evidence against the defendant.² In an action against a third party for inducing the plaintiff's husband to send her away, the declarations of the husband made in the absence of the defendant are not admissible.³ Written declarations by the wife not proved to have been authorized by or in the possession of defendant cannot be read in evidence against him.⁴ The wife's letters or statements may be proved to show the previous state of their relations, and of her feelings toward her husband.⁵ But not the opinion of a physician who had attended her as to her fondness for the defendant.⁶ The previous unchastity of the wife may be shown.⁷ Evidence of prior acts of adulterous intercourse upon which the statute of limitations has run is admissible for the purpose of showing the intimate relations of the parties, and of corroborating the evidence introduced to establish the illicit act which is within the statute, and upon which a recovery is sought.⁸

§ 1109. **Interference with Parental Rights—In General.**—A parent has a right of action for damages for being deprived of the services of his child.⁹ Loss of service to the parent may be occasioned by enticing the child away,¹⁰

¹ *Winsmore v. Greenbank*, Willes, 577.

² *Bull. N. P.* 28; *Preston v. Bowers*, 13 Ohio St. 1; 82 Am. Dec. 430; *McVey v. Blair*, 7 Ind. 590; *Dance v. McBride*, 43 Iowa, 624.

³ *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397.

⁴ *Underwood v. Linton*, 54 Ind. 468.

⁵ *Willis v. Bernard*, 8 Bing. 376; *Gilchrist v. Bale*, 8 Watts, 335; 34 Am. Dec. 469; *Palmer v. Crook*, 7 Gray, 413.

⁶ *McVey v. Blair*, 7 Ind. 590.

⁷ *Torre v. Summers*, 2 Nott & McC.

267; 10 Am. Dec. 597; *Clouser v. Clapper*, 59 Ind. 548; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539.

⁸ *Conway v. Nicol*, 34 Iowa, 533.

⁹ See *ante*, Division I., Title Parent and Child.

¹⁰ *Bundy v. Dodson*, 28 Ind. 295; *Everett v. Sherfey*, 1 Iowa, 356; *Sherwood v. Hall*, 3 Sum. 127; *Caughey v. Smith*, 47 N. Y. 244; *Stow v. Heywood*, 7 Allen, 118; *Plummer v. Webb*, 4 Mason, 380; *Sargent v. Mathewson*, 38 N. H. 54; *Vaughan v. Rhodes*, 2 McCord, 227; 13 Am. Dec. 713; *Jones v. Tevis*, 4 Litt. 25; 14 Am. Dec. 98.

by forcibly abducting the child,¹ by beating or otherwise purposely injuring the child,² by a negligent injury which disables the child from labor,³ and in case of a female child, by seduction.⁴ Giving shelter or protection to a child to enable him to keep away from his parent is actionable.⁵ So an action has been sustained for enticing a minor child from the service of the parent, and procuring her to be married without his consent.⁶

§ 1110. **Seduction Defined — Elements of.** — Seduction is "the wrong of inducing a female to consent to unlawful sexual intercourse by enticements and persuasions overcoming her reluctance and scruples."⁷ The defendant must by acts and persuasion have overcome her opposition and debauched her.⁸ In Indiana, in an action brought by a woman for her own seduction, the complaint alleged that the defendant wickedly, deceitfully, and wrongfully seduced the plaintiff under a promise on his part to pay off liens on her property, furnish her money to carry on her business, and to keep and support her, in consideration that she would submit her person to his desires; that she believed and relied on these promises, and that he

¹ *Magee v. Holland*, 27 N. J. L. 86; 72 Am. Dec. 341; *Plummer v. Webb*, 4 Mason, 380.

² *Hoover v. Heim*, 7 Watts, 62; *Cowden v. Wright*, 24 Wend. 429; 35 Am. Dec. 633; *Whitney v. Hitchcock*, 4 Denio, 461; *Klugman v. Holmes*, 54 Mo. 304.

³ *Karr v. Parks*, 44 Cal. 46.

⁴ See *post*, sec. 1110.

⁵ *Sargent v. Mathewson*, 38 N. H. 54; *Butterfield v. Ashley*, 6 Cush. 249. *Everett v. Sherfey*, 1 Iowa, 356.

⁶ *Hills v. Hobert*, 2 Root, 48; *Jones v. Tevis*, 4 Litt. 25; 14 Am. Dec. 98. *Contra*, *Hervey v. Moseley*, 7 Gray, 479, the court saying: "The law of marriage entirely overrides the general principles of right of the parent to the services of the child, or the duties from one of the other as servant and master, by allowing the female child to terminate it at any moment

after she arrives at the age of twelve years, by uniting herself to some one in marriage. If the marriage of the daughter was a legal act, from the time of its consummation the daughter was legally discharged from all further duties to perform service for her parent, having assumed new relations inconsistent therewith."

⁷ *Abbott's Law Dict.* The word "seduce," when used with reference to the conduct of a man toward a woman, has a precise and determinate signification, and it is not necessary, in an information for the crime of seduction, to charge the offense in any other language: *State v. Bierce*, 27 Conn. 319.

⁸ *Hogan v. Cregan*, 6 Robt. 138; *Delvee v. Boardman*, 20 Iowa, 446; *Smith v. Milburn*, 17 Iowa, 30; *Brown v. Kingsley*, 38 Iowa, 220; *Wouter v. Gerser*, 9 La. Ann. 523.

failed to fulfill them; that they were falsely made with a view to her seduction. The court held that the action would not lie. The plaintiff's real grievance, said the court, was the defendant's failure to fulfill his promises. The plaintiff agreed to dispose of her virtue for a pecuniary consideration. Such a contract being immoral, the law will afford her no remedy. She bargained for her virtue, and if she failed to secure the price agreed upon, it is her own fault and folly, and she cannot be heard to complain.¹ There is no seduction where a woman "yields through the promptings of her own lascivious desires."² An action for seduction does not lie if the woman yielded because the man told her that if she did not he should go with other women, and where he informed her that he visited her to procure sexual intercourse.³ But in the civil action by the master or parent for loss of services it does not seem to be important by what means the seduction has been accomplished.⁴ Proof of the sexual intercourse followed by pregnancy (or other effect causing a loss of services) is sufficient.⁵ It is seduction, though the connection is accomplished by force.⁶ A woman formerly unchaste may be seduced, though this fact may, in an action under a statute brought by herself for her own seduction, affect the measure of damages.⁷ But the woman must be chaste at the time to be the subject of seduction, though she may have fallen before and repented.⁸

§ 1111. **Seduction Alone not Actionable.**—The seduction alone does not give a right of action, unless the master can show that loss of service followed as a result

¹ *Wilson v. Ensworth*, 85 Ind. 399.

² *Bell v. Rinker*, 29 Ind. 267.

³ *Baird v. Boehner*, 72 Iowa, 318.

⁴ *Reed v. Williams*, 5 Sneed, 580; 73 Am. Dec. 157; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100.

⁵ *Leucker v. Steilen*, 89 Ill. 545; 31 Am. Rep. 104.

⁶ *Leucker v. Steilen*, 89 Ill. 545; 31

Am. Rep. 104; *Furman v. Applegate*, 23 N. J. L. 28; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; *Dalton v. Moore*, 5 Lans. 454; *Lawrence v. Spence*, 29 Hun, 169; 99 N. Y. 669; *Lavery v. Crooke*, 52 Wis. 612; 38 Am. Rep. 768.

⁷ *Smith v. Milburn*, 17 Iowa, 30.

⁸ *Wilson v. State*, 73 Ala. 527.

of the seduction.¹ But neither is it necessary to prove that the servant became pregnant.² Here, of course, the loss of service is clear.³ Where the direct result of the seduction is a loss of service, the master may recover;⁴ as where the seduction affected the girl's mind, and the master was forced to keep a watch on her and give her medical attendance;⁵ where it caused bodily injury impairing her health and her capacity to labor;⁶ where a venereal disease was communicated to the girl, injuring her health.⁷ Evidence that the daughter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself, though no pregnancy or disease ensued, will justify the jury in finding an incapacity to work as the proximate effect of the seduction.⁸ But a loss of health caused by mental suffering, not the consequence of the seduction, but produced by subsequent causes, such as her abandonment by the seducer, shame resulting from exposure, or the like, is too remote a consequence of the seduction, and will not sustain an action.⁹ So where a man seduced the plaintiff's daughter, but the jury found that he was not the father of the child which she subsequently bore, it was held that there was no cause of action against him.¹⁰ Where pregnancy results, the action may be brought before the birth of the child.¹¹

¹ *White v. Nellis*, 31 N. Y. 405; 88 Am. Dec. 282; *Hill v. Wilson*, 8 Blackf. 123.

² *White v. Nellis*, 31 N. Y. 405; 88 Am. Dec. 282; *Manvell v. Thomson*, 2 Car. & P. 303. *Contra*, *Eager v. Grimwood*, 1 Ex. 61.

³ *White v. Nellis*, 31 N. Y. 405; 88 Am. Dec. 282.

⁴ *Ingerson v. Miller*, 47 Barb. 47.

⁵ *Manvell v. Thomson*, 2 Car. & P. 303; *Van Horn v. Freeman*, 6 N. J. L. 322.

⁶ *Abrahams v. Kidney*, 104 Mass. 222; 6 Am. Rep. 220.

⁷ "Nor, in my judgment, does the remedy depend upon the sex of the

servant. The debased woman who lures to her vile embrace an innocent boy, and infects him with loathsome disease, is equally liable to this action if an injury to his master's right to service follow from her crime"; *White v. Nellis*, 31 N. Y. 405; 88 Am. Dec. 282.

⁸ *Blagge v. Illsey*, 127 Mass. 191; 34 Am. Dec. 361.

⁹ *Knight v. Wilcox*, 14 N. Y. 413; *Boyle v. Brandon*, 13 Mees. & W. 738.

¹⁰ *Eager v. Grimwood*, 1 Ex. 61.

¹¹ *Briggs v. Evans*, 5 Ired. 16. "The action was held to lie, though the daughter had not been actually confined before action brought, and

ILLUSTRATIONS. — A minor daughter resided with her father, and was engaged as a school-teacher under an agreement made with him; while thus employed she was seduced, became pregnant, and died suddenly about four months after conception. A *post-mortem* examination disclosed a dead fœtus, and a congested brain, caused, as it was supposed, by nervous excitability or extreme mental agitation. *Held*, that as a matter of necessity she must have been in no physical condition to render services for several weeks before her death, the action was maintainable by the father: *Ingerson v. Miller*, 47 Barb. 47.

§ 1112. **Right of Action by Woman Seduced.** — No action lies at common law by a woman against a man for seducing her, and getting her with child, because she cannot complain of an injury to which she consented; and if there has been a wrong, she is *particeps criminis*.¹ There might be special circumstances of fraud on the defendant's part, which, in connection with the seduction, would support an action for damages by the woman; as, for example, the seduction of an innocent woman through a pretended marriage by a person having a wife.² In a Connecticut case, an action was brought by a girl under age, in which the declaration alleged that the defendant fraudulently, and with the intention of getting her within

though the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy": Per Lord Denman, C. J., in *Joseph v. Corvander*, Winton Sum. Ass., 1834.

¹ *Paul v. Frazier*, 3 Mass. 71; 3 Am. Dec. 95; *Hamilton v. Lomax*, 26 Barb. 615; *Satterthwaite v. Dewhurst*, 4 Doug. 315; *Roberts v. Connelly*, 14 Ala. 235; *Woodward v. Anderson*, 9 Bush, 624; *Dennis v. Clark*, 2 Cush. 350; 48 Am. Dec. 671; *Burks v. Shain*, 2 Bibb, 341; 5 Am. Dec. 616; *Weaver v. Bachert*, 2 Pa. St. 80; 44 Am. Dec. 159; *Conn v. Wilson*, 2 Over. 233; 5 Am. Dec. 663; *Roper v. Clay*, 18 Mo. 383; 59 Am. Dec. 314; *Jordan v. Hovey*, 72 Mo. 574; 37 Am. Rep. 447; *Smith v. Richards*, 29 Conn. 232. In *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95, *Parsons, C. J.*, said: "She is a partaker of the crime, and cannot come into court

to obtain satisfaction for a supposed injury to which she was consenting. It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider before they provide this remedy whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced, in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided, and we do not profess to be wiser than the law."

² *Hutchinson v. Horn*, 1 Ind. 363; 50 Am. Dec. 470.

his power for purposes of prostitution, she being then but fourteen years of age, destitute, without relatives, and in the care of a charitable society in New York, represented to her, and to the persons who had her in charge, that he wanted her to go to his house in Connecticut, and live in his family as a servant, and that he was a suitable person to take charge of her for that purpose; and that, with the advice of her friends, she came to his house with him for the purpose, and that, while she was living in his house, the defendant, by taking advantage of her ignorance and dependence, and want of friends, and of her fear of him, persuaded her to submit to carnal intercourse with him, and that he thus debauched her, and ruined her character and prospects for life. It was held that the action was maintainable.¹ But in Missouri an employer persuaded his female servant to consent to sexual intercourse with his minor son, to whom she was affianced. The son subsequently refused to marry her. The court held that the female had no ground of action of damages against the employer and father.² By statute in some states the action has been given to the woman seduced.³ A statute providing that "an action for seduction can be maintained without allegation or proof of loss of service" does not give the right of action to any other persons than those who could maintain it at common law.⁴ Where the action is given to an unmarried woman, the fact that she was unmarried at the time of the seduction must be alleged, and also proved.⁵ The plaintiff's subsequent marriage does not defeat the action;⁶ but husband and wife may sue for her previous

¹ *Smith v. Richards*, 29 Conn. 232.

² *Jordan v. Hovey*, 72 Mo. 574; 37 Am. Rep. 447.

³ *Thompson v. Young*, 51 Ind. 599; Cal. Civ. Code, sec. 374; Rev. Code Ala., 25, 29; Ind. Rev. Stats. 1876, p. 43. See note to *Weaver v. Bachert*, 2 Pa. St. 80, in 44 Am. Dec. 166.

⁴ *Woodward v. Anderson*, 9 Bush, 624; but see *Watson v. Watson*, 49 Mich. 540.

⁵ *Thompson v. Young*, 51 Ind. 599; *Grover v. Dill*, 3 Iowa, 337; *Galvin v. Crouch*, 65 Ind. 56; *Dowling v. Crapo*, 65 Ind. 209.

⁶ *Dowling v. Crapo*, 65 Ind. 209.

seduction.¹ A state statute authorizing a woman to prosecute an action for her own seduction gives her no right of action, where the seduction was accomplished in another state, although the illicit intercourse continued in the former.²

§ 1113. **Right of Action by Father.** — The law gives no right of action to the parent as such. The right arises simply when the child is living with the parent, or he is entitled to her services as a master is entitled to the services of a servant. Hence the action is not maintainable upon the relation of parent and child, but solely upon that of master and servant.³ The relation of master and servant is established if it is shown that the parent, at the time of the seduction, had the right to control the services of the daughter.⁴ The daughter need not at the time have been actually a member of the father's household. If she were not in the actual service of another, and the father had a right to recall her to his own service, he may maintain the action the same as if she actually had been recalled or returned.⁵ A constructive service is considered to arise

¹ *Wicell v. Blackford*, 6 Baxt. 141.

² *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156.

³ *White v. Nellis*, 31 N. Y. 405; 88 Am. Dec. 282; *Bartley v. Richtmyer*, 4 N. Y. 38; 54 Am. Dec. 338; *Scott v. Cook*, 1 Duvall, 314; *Logan v. Murray*, 6 Serg. & R. 175; 9 Am. Dec. 422; *Pruitt v. Cox*, 21 Ind. 15; *Grinnell v. Wells*, 7 Man. & G. 1033; *South v. Denniston*, 2 Watts, 474; *Manley v. Field*, 7 Com. B., N. S., 96; *Harris v. Butler*, 1 Ex. 61; *Roberts v. Connelly*, 14 Ala. 235.

⁴ *Roberts v. Connelly*, 14 Ala. 235; *Briggs v. Evans*, 5 Ired. 16; *Wallace v. Clark*, 2 Over. 93; 5 Am. Dec. 654.

⁵ *Cooley on Torts*, 231; *Bolton v. Miller*, 6 Ind. 265; *Bartley v. Richtmyer*, 4 N. Y. 38; 53 Am. Dec. 338; *Martin v. Payne*, 9 Johns. 387; 6 Am. Dec. 287; *Mulvehall v. Millward*, 11 N. Y. 343; *Hornketh v. Barr*, 8 Serg.

& R. 36; 11 Am. Dec. 568; *Kennedy v. Shea*, 110 Mass. 147; 14 Am. Rep. 584; *Van Horne v. Freeman*, 6 N. J. 322; *Mercer v. Walmsley*, 5 Har. & J. 27; 9 Am. Dec. 486; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Roberts v. Connelly*, 14 Ala. 239; *Udeggraf v. Bennett*, 8 Iowa, 72; *Greenwood v. Greenwood*, 28 Md. 369; *Clark v. Fitch*, 2 Wend. 459; 20 Am. Dec. 639; *Stiles v. Telford*, 10 Wend. 338; *Blagge v. Illsey*, 127 Mass. 191; 34 Am. Rep. 361; *Wallace v. Clark*, 2 Over. 93; 5 Am. Dec. 654; *Emery v. Gowen*, 4 Me. 33; 16 Am. Dec. 233; *Clark v. Fitch*, 2 Wend. 459; 20 Am. Dec. 639. The English rule is more strict. It makes the right depend on the *animus revertendi*, where the daughter is living away from home, though still subject to the parent's authority and control: *Dean v. Peel*, 5 East, 45. In *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338, Bronson,

in favor of the parent, where she has left his house and is in another's employ, if she is under age, "inasmuch as he has the right to control her conduct, is bound for her support, and may at any time revoke her leave of absence and reclaim her services."¹ So where the infant daughter, when seduced, is only absent from her father upon a visit, the action is maintainable.²

But if the daughter is in the service of another, the master, and not the parent, has the right of action.³ A father cannot sue for seduction of his minor daughter whom he had left to shift for herself, and who, at the time of the seduction, was working for another person as a household servant;⁴ nor when the daughter is of full age, and not living in the father's family, but in the actual employment of another person, though working under a contract made by her father, who was to receive her wages.⁵ And the parent has no action even for her seduction by the master while in the service of the latter.⁶ But if the defendant procured the woman to enter his service fraudulently, and for the purpose of withdrawing her from her family and seducing her, this is a wrong which precludes his claiming any rights or protection as master, and the parent may support an action as if the hiring had never taken place.⁷ The moment an actual service of the daughter with another is terminated, even

C. J., says: "Our cases stand upon the same foundation, with only this difference, that we go further than the English courts in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure."

¹ *Boyd v. Byrd*, 8 Blackf. 113; 44 Am. Dec. 740; *Bolton v. Miller*, 6 Ind. 266; and cases in last note.

² *Griffiths v. Teetgen*, 15 Com. B.

344; *Bartley v. Richtmyer*, 4 N. Y. 38; 53 Am. Dec. 338.

³ *Dean v. Peel*, 5 East, 49; *Nickle-son v. Shyker*, 10 Johns. 115; 6 Am. Dec. 318; *Dain v. Wyckoff*, 7 N. Y. 191; *South v. Denniston*, 2 Watts, 474; *White v. Murland*, 71 Ill. 452; 22 Am. Rep. 100; *Kinney v. Laughenour*, 89 N. C. 365.

⁴ *Ogborn v. Francis*, 44 N. J. L. 441; 43 Am. Rep. 394.

⁵ *McDaniel v. Edwards*, 7 Ired. 408; 47 Am. Dec. 331.

⁶ *Dain v. Wyckoff*, 7 N. Y. 191.

⁷ *Speight v. Oliviera*, 2 Stark. 435; *Dain v. Wyckoff*, 18 N. Y. 45; 72 Am. Dec. 493; 7 N. Y. 191.

though it be wrongfully, and she intends to return to her father, he has a right to her services, and may maintain the action.¹ The seduction of a female apprentice while she is a minor, and after her master turns her away, or after, with the consent of the master, her return to reside with her father, gives the latter a cause of action against the seducer.² Where the relation of master and servant existed at the time of seduction, it is sufficient evidence of loss of service caused thereby to show that a confinement took place in the house of a third person, at a time when either the right to the service was continuing, or, although interrupted by an intermediate contract of service, had again risen by its determination, the girl seduced having had at such time an *animus revertendi*, but not carrying out her intention in consequence of her impending confinement.³ Where a female has been seduced while a minor, her father has a right of action for such seduction after she attains her majority. This right of action is not taken away or negatived by the provision of the statute which gives to an unmarried female the right to prosecute an action for her own seduction.⁴

ILLUSTRATIONS. — A verbally agreed with B that his daughter should live in B's family as servant until her arrival at eighteen years of age, when B was to give her an outfit, and in the mean while was to provide the girl with board, clothing, and schooling, and at a proper time send her to the minister for confirmation; A reserved the right to call his daughter home, in case of sickness, to help the family. The girl, while in B's service, was seduced by C, his son. *Held*, that this parol contract did not transfer the father's right to service beyond recall, and an action for seduction could be brought by A against C: *Mohry v. Hoffman*, 86 Pa. St. 358. The plaintiff's daughter was employed by a third person, but the plaintiff required her to spend a part of every Sunday at home, and while there she did work for him. *Held*, that she was his servant, so that he could maintain the action: *Kennedy v. Shea*, 110 Mass. 147;

¹ *Terry v. Hutchinson*, L. R. 3 Q. B. 599.

² *Emery v. Gowen*, 4 Me. 33; 16 Am. Dec. 233.

³ *Long v. Keightley*, 5 Cent. L. J. 80.

⁴ *Stevenson v. Belknap*, 6 Iowa, 97; 71 Am. Dec. 392.

14 Am. Rep. 584. A parent bound her daughter as an apprentice, who was seduced, upon which the indentures were canceled by consent, and the daughter returned to the parent's house, and was there delivered of a child. *Held*, that the parent might maintain an action on the case for the seduction: *Sargent v. —*, 5 Cow. 106. A daughter of the age of nineteen years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work, but there was no agreement for her continuance in his house for any time. While at her uncle's house she was seduced and got with a child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him, though if the misfortune had not happened she had no intention of returning to her father. *Held*, that there was such a constructive service on behalf of the father as entitled him to maintain the action for seduction: *Martin v. Payne*, 9 Johns. 387; 6 Am. Dec. 88.

§ 1114. **By Mother.**—The mother after the father's death may maintain an action for the seduction of a minor daughter, being entitled to her services.¹ She may sue (according to some authorities) where the seduction took place before the father's death, and the confinement afterwards;² so where the daughter, though over twenty-one, is rendering services to the widowed mother;³ so where the mother has been deserted by her husband.⁴ To entitle a mother to sue, it must appear that her husband is dead, or that the custody of the daughter had been decreed to her, and that, in the absence of any proof that the relation of master and servant existed between them, she was entitled to her daughter's services.⁵

¹ *Coon v. Moffett*, 3 N. J. L. 583; 4 Am. Dec. 392; *Furman v. Van Sise*, 56 N. Y. 435; 15 Am. Rep. 441; *Gay v. Durland*, 51 N. Y. 424; 50 Barb. 100; *Keller v. Donnelly*, 5 Md. 211; *Sargent v. —*, 5 Cow. 106; *Felkner v. Scarlet*, 29 Ind. 154; *Blanchard v. Illsey*, 120 Mass. 487; 21 Am. Rep. 535. *Contra*, *South v. Denniston*, 2 Watts, 474; *Bartley v. Richtmyer*, 4 N. Y. 38; 53 Am. Dec. 338; *Bronson*, C. J.

² *Coon v. Moffett*, 3 N. J. L. 583; 4 Am. Dec. 392; *Parker v. Meek*, 3

Sneed, 59. *Contra*, *Heinrichs v. Kerchner*, 35 Mo. 378; *Logan v. Murray*, 6 Serg. & R. 175; 9 Am. Dec. 423; *Vosel v. Cole*, 10 Mo. 634; 47 Am. Dec. 136.

³ An action will lie in favor of a widowed mother, living with her daughter, who is over twenty-one years of age, and is owner of the establishment, but renders service to the mother and family; *Villepigue v. Shuler*, 3 Strob. 462.

⁴ *Badgley v. Decker*, 44 Barb. 577.

⁵ *Hobson v. Fullerton*, 4 Ill. App. 282.

ILLUSTRATIONS.—A girl of twenty-four years of age, who, after her father's death, resided with her mother, discharging domestic duties for her, was seduced in her mother's house, on the night previous to her emigrating to America in pursuance of previous arrangements. She entered into another service on her arrival in America, but subsequently, finding herself pregnant, left that service in order to return home. On her return to Ireland, she went to reside in her sister's house, where she remained until her confinement had taken place, a considerable time after which she returned to the house of her mother, who then brought an action for the seduction. *Held*, that there was a loss of service for which the action was maintainable: *Long v. Keightly*, 5 Cent. L. J. 80. The plaintiff's husband had been absent and unheard from more than seven years. The daughter was thirty-one years old. The testimony on the part of plaintiff tended to prove that the daughter had always lived at home with plaintiff, had assisted her about her household work, had done errands for the family, had worked in a neighboring factory most of the time since she was fifteen years old, and had paid her wages to plaintiff, who had used them in the support of her family. A verdict was directed for defendant. *Held*, erroneous: *Davidson v. Abbott*, 52 Vt. 570; 36 Am. Rep. 767. D. seduced the daughter of P. The daughter was sixteen years old and in P.'s employ. Her father was dead, and P. had remarried. P., however, controlled and supported the daughter, and D. had always accounted to P. for the daughter's wages. *Held*, that P. had a right of action for the seduction: *Lampman v. Hammond*, 3 Thomp. & C. 293. A daughter at the age of eight or nine years left the residence of her mother, at the suggestion of friends, because the mother was a common prostitute, and went to reside in the family of the defendant, where she continued until she was seventeen or eighteen years of age, when she was seduced by him, and left the state with him, and went to Louisiana, where she was delivered of a child. From the time she left her mother's house, there was no intercourse between the mother and daughter, and the mother continued to be a prostitute. *Held*, that the mother could not maintain the action: *Roberts v. Connelly*, 14 Ala. 235.

§ 1115. **By Other Persons.**—The action may be maintained by a person standing *in loco parentis* to the girl;¹ as a grandfather of an infant female standing *in loco parentis*

¹ *Ball v. Bruce*, 21 Ill. 161; *Keller* 338; *Davidson v. Goodall*, 18 N. H. v. Donnelly, 5 Md. 211; *Bartley v.* 423; *Inman v. Dearman*, 11 East, 23; *Richtmyer*, 4 N. Y. 38; 53 Am. Dec. *Ingersoll v. Jones*, 5 Barb. 661.

to her;¹ a cousin who has furnished her a home;² an aunt or uncle who has brought up the girl;³ a guardian;⁴ a step-father.⁵ Where a minor step-daughter leaves the house of her step-father, and is seduced while in the service of a third person, the step-father cannot maintain an action for the seduction, although before the birth of her child she returns to his house, engages in his service, and is there nursed and attended during her confinement.⁶ His personal representative may maintain an action for the seduction in the father's lifetime.⁷

ILLUSTRATIONS. — The woman seduced resided at the time in the family of a married sister without paying for her board, but with no agreement with her father or herself for any payment for services. *Held*, that the sister's husband could not sue as master for her seduction: *Blanchard v. Ilsley*, 120 Mass. 489; 21 Am. Rep. 535. The girl seduced had a mother living, but had not heard from her father for fourteen years, and supposed him dead; she had lived in the plaintiff's family most of the time since she was seven years old, and the plaintiff had taken her to bring up; that she was treated by him like one of his own children, and worked for him as they did, and was supported, and clothed, and educated by him, and taken care of by him during her sickness, and he paid the expenses of her lying-in. *Held*, that the plaintiff stood *in loco parentis*, and might maintain the action, although the girl at the time of her seduction lived and worked in the family of another with the plaintiff's assent: *Ingersoll v. Jones*, 5 Barb. 661.

§ 1116. **Where Woman is of Age.** — Where the daughter is over twenty-one, the father may maintain an action for her seduction, if she lives in his house, and he can command her services,⁸ even though at the time of the

¹ *Certwell v. Hoyt*, 6 Hun, 575; 13 N. Y. 570.

² *Davidson v. Goodall*, 18 N. H. 423.

³ *Manvell v. Thomson*, 6 Car. & P. 303; *Edmonson v. Mitchell*, 2 Term Rep. 4.

⁴ *Fernsler v. Moyer*, 3 Watts & S. 416; 39 Am. Dec. 33; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; 47 Am. Dec. 41. *Contra*, *Blanchard v. Ilsley*, 120 Mass. 487; 21 Am. Rep. 535.

⁵ *Maguinay v. Saudek*, 5 Sneed, 146. Though the daughter is the ille-

gitimate child of his wife: *Bracy v. Kibbe*, 31 Barb. 273.

⁶ *Bartley v. Richtmyer*, 4 N. Y. 38; 53 Am. Dec. 338.

⁷ *Noice v. Brown*, 39 N. J. L. 569.

⁸ *West v. Strouse*, 38 N. J. L. 184; *Vossell v. Cole*, 10 Mo. 634; 47 Am. Dec. 136; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Kendrick v. McCrary*, 11 Ga. 603; *Wilbert v. Hancock*, 5 Bush, 567; *Mercer v. Walmsley*, 5 Har. & J. 27; 9 Am. Dec. 486.

seduction she was temporarily absent.¹ Where she lives in his house, the presumption is that she renders services, or that he can command them.² But in the case of an adult away from home, clearer proof of service is required.³ And the mere permission of the master of an adult servant allowing her after work to assist her mother does not give the latter any right of action.⁴ The father may sue, after she reaches twenty-one, for her seduction while a minor.⁵

§ 1117. **Statutory Remedy.** — Statutes in several states allow suits for seduction to be brought for the benefit of the woman herself, some near relative or a guardian being suffered to bring it, and all allegations of loss of service being dispensed with.⁶

§ 1118. **Defenses.** — If the parent consent to the seduction either actually or impliedly, as by introducing the daughter to profligate persons, or permitting her to keep company with such people, or encouraging or conniving at the seducer's acts, this is a bar to the action.⁷

¹ *Lipe v. Eisenlerd*, 32 N.Y. 229.

² *Id.*; *Brown v. Ramsay*, 29 N. J. L. 118; *Hudkins v. Haskins*, 22 W. Va. 645. At any rate, very slight evidence of service is sufficient: *Emery v. Gowen*, 4 Me. 33; 16 Am. Dec. 233; *Vossell v. Cole*, 10 Mo. 634; 47 Am. Dec. 136.

³ *Nickleson v. Stryker*, 10 Johns. 115; 6 Am. Dec. 319; *Patterson v. Thompson*, 24 Ark. 55; *Lee v. Hodges*, 13 Gratt. 726; *Miller v. Thompson*, 1 Wend. 447; *Briggs v. Evans*, 5 Ired. 21; *Mercer v. Walmsley*, 5 Har. & J. 27; 9 Am. Dec. 436.

⁴ *Thompson v. Ross*, 5 Hurl. & N. 16.

⁵ *Stevenson v. Belknap*, 6 Iowa, 97; 71 Am. Dec. 392.

⁶ *Updegraff v. Bennett*, 8 Iowa, 72; Ga. Code, 3009; Iowa Code, sec. 2555; Mich. Comp. L. 1871, 1760; *Scott v. Cook*, 1 Duvall, 314.

⁷ *Reddie v. Scoolt*, 1 Peake, 316; *Seagar v. Sligerland*, 2 Caines, 219;

Vossell v. Cole, 10 Mo. 634; 47 Am. Dec. 136; *Travis v. Barger*, 24 Barb. 614; *Smith v. Mastin*, 15 Wend. 270; *Graham v. Smith*, 1 Edw. Ch. 267; *Richardson v. Fouts*, 11 Ind. 466; *Hollis v. Wells*, 3 Pa. L. J. 169, the court saying: "This action is always founded on a wrong done by the defendant, and as regards the will and consent of the father, the daughter is supposed to be violated with force. It is this absence of consent on his part, this violation of his daughter's chastity against his will, that entitles him to sustain his action for a compensation in damages. When the criminal intercourse has been had with his knowledge and under his connivance, he would seek redress with but an ill grace indeed. He would not actually be a *particeps criminis*, but in want of decency and in breach of parental duty, he would approach very near to it. His indifference to his daughter's morals and chastity would meet with

Mere negligence on the parents' part, when not amounting to connivance, may be shown in mitigation of damages,¹ but is not a bar.² That the plaintiff allowed the defendant, a married man, to visit his daughter as a suitor, and placed her in exposed situations, does not debar him from maintaining an action for the seduction, unless he knew the defendant to be married.³ It is no defense that the defendant was an infant;⁴ or that he is liable to a criminal prosecution for the act;⁵ or that (in an action by a parent) there has been a recovery in a former suit by the daughter;⁶ or that the defendant subsequently married the girl (the action being brought by the parent);⁷ or that, after the seduction, the plaintiff married a person other than the defendant;⁸ or that she consented to the intercourse;⁹ or that the girl was unchaste;¹⁰ or that the act was done without her consent, and was not seduction, but rape.¹¹

§ 1119. **Damages — Measure of.** — The damages are not restricted to the loss of service and the expense consequent thereon. Proof of the relation of master and servant, and of the loss of service by means of the wrongful act of the defendant, has relation only to the form of the remedy, and the action being sustained in point of form by the introduction of these technical elements,

but a just retribution in her misfortune and disgrace. The fault would be as much his own as her's or her seducer's; and his assurance in coming to court to ask for a reward for the perpetration of a wrong which was known to him, and which he might have prevented, would justify the belief that he had no objections to its commission." And a custom of "bundling," that is, for persons courting to sleep together, cannot be set up as a defense: *Seagar v. Sligerland*, 2 Caines, 219; *Hollis v. Wells*, 3 Pa. L. J. 169.

¹ *Graham v. Smith*, 1 Edm. Sel. Cas. 267; *Parker v. Elliott*, 6 Munf. 587.

² *Id.*; *Zerfing v. Mourer*, 2 G. Greene, 520; *Travis v. Barger*, 24 Barb. 614.

³ *Richardson v. Fouts*, 11 Ind. 466.

⁴ *Lee v. Hefley*, 21 Ind. 98.

⁵ *Klopper v. Broume*, 26 Wis. 372; *Eicher v. Kistler*, 14 Pa. St. 282; 53 Am. Dec. 551.

⁶ *Pruitt v. Cox*, 21 Ind. 15.

⁷ *Eicher v. Kistler*, 14 Pa. St. 282; 53 Am. Dec. 551. But this fact is relevant in mitigation of damages: *Id.* Nor is a release from the daughter a bar: *Sellers v. Kidner*, 1 Head, 134; *Gimbel v. Smidth*, 7 Ind. 627.

⁸ *Dowling v. Crapo*, 65 Ind. 209.

⁹ *McAulay v. Birkhead*, 13 Ired. 28; 55 Am. Dec. 427.

¹⁰ *Smith v. Milburn*, 17 Iowa, 30; *Harrison v. Price*, 22 Ind. 165.

¹¹ *Ante*, § 1110.

the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury.¹ This includes the disgrace cast upon the family, and the distress of mind of the parent at his daughter's fall, and these juries are accustomed to compensate with heavy damages.² Either parent may recover vindictive or exemplary damages;³ but one not a parent or *in loco parentis*, but merely the master, can only recover for his actual loss of service.⁴ The mother cannot recover compensation for the support and maintenance of the daughter's illegitimate child.⁵ But the allowance by law to the daughter for the bastard's support does not affect the parent's damages;⁶ nor the fact that by statute the daughter is allowed to sue for the same seduction.⁷ The cost of medicine and medical attendance is recoverable, whether the father has paid for them or not; but no recovery can be had for the wounded feelings of his family, nor of exemplary damages, where the intercourse was caused as much by the misconduct of the daughter as of the man.⁸ The measure of damages is for the jury, whose discretion will be rarely interfered with.⁹

§ 1120. **Evidence — In General.** — On the question of damages, evidence of the situation in life and circum-

¹ Phelin v. Kenderdine, 20 Pa. St. 354; Lipe v. Eisenlerd, 32 N. Y. 229, 236; Clark v. Fitch, 2 Wend. 459; 20 Am. Dec. 639; Stiles v. Tilford, 10 Wend. 338; Pruitt v. Cox, 21 Ind. 15; Felkner v. Scarlet, 29 Ind. 154; Phillips v. Hoyle, 4 Gray, 568; Grable v. Margrave, 4 Ill. 372; 38 Am. Dec. 88; White v. Murtland, 71 Ill. 250; 22 Am. Rep. 100; Kendrick v. McCrary, 11 Ga. 603; Ellington v. Ellington, 47 Miss. 329; Fox v. Stevens, 13 Minn. 272; Stevenson v. Belknap, 6 Iowa, 97; 71 Am. Dec. 392.

² Cases in last note; and see Stevenson v. Belknap, 6 Iowa, 97; 71 Am.

Dec. 392; Rollins v. Chalmers, 51 Vt. 592; Taylor v. Shellkett, 66 Ind. 297; Barbour v. Stephenson, 32 Fed. Rep. 66.

³ Knight v. Wilcox, 18 Barb. 212; Damon v. Moore, 5 Lans. 454; Badgley v. Decker, 44 Barb. 577; McAulay v. Birkhead, 13 Ired. 28; 55 Am. Dec. 427.

⁴ Lipe v. Eisenlerd, 32 N. Y. 229.

⁵ Hitchman v. Whitney, 9 Hun. 512.

⁶ Sellars v. Kinder, 1 Head, 134.

⁷ Stevenson v. Belknap, 6 Iowa, 97; 71 Am. Dec. 392.

⁸ Comer v. Taylor, 82 Mo. 341.

⁹ Stevenson v. Belknap, 6 Iowa, 97; 71 Am. Dec. 392.

stances of the parties is relevant.¹ So is evidence of the good character of both plaintiff's and defendant's families.² The circumstances under which the girl was seduced, and the means used to seduce her, may be shown.³ Testimony relating directly to facts bearing on the relations of the persons whose conduct is in question is admissible as part of the *res gestæ*,⁴ as familiarities which may or may not have been innocent,⁵ and evidence is admissible of a connection between the girl and defendant beyond the period of three years from the commencement of the suit. All defendant's intercourse with her is but one transaction, and, with all the circumstances of the case, should go to the jury, both to prove whether the defendant is father of the child, and to show the extent of the injury in aggravation of damages.⁶ The dying declarations of the woman who died in childbirth, that the defendant was the father of the child, are not admissible.⁷ The fact that a man ran away six weeks after he was accused of seducing a woman does not, in her action against him, constitute any evidence of his guilt.⁸

§ 1121. **Evidence in Aggravation.**—Any facts not too remote may be shown in aggravation of damages;⁹ as the relationship between the plaintiff and the one seduced, the situation of the family, etc.;¹⁰ that defendant

¹ *Andrews v. Askey*, 8 Car. & P. 9; *McAulay v. Birkhead*, 13 Ired. 23; 55 Am. Dec. 427; *Grable v. Margrave*, 4 Ill. 372; 38 Am. Dec. 88; *Rea v. Tucker*, 51 Ill. 110; 99 Am. Dec. 539; *White v. Murtland*, 71 Ill. 260; 22 Am. Rep. 100; *Wilson v. Shepler*, 86 Ind. 275.

² *Parker v. Monteith*, 7 Or. 277, the court saying: "It was competent for the respondent to show that while it was his duty to be watchful over the morals of his daughter, he was nevertheless justified in permitting that degree of social intimacy between her and the appellant which is always allowable between the different sexes

in good families, but which would not have been tolerated had he belonged to a family which was low or degraded."

³ *Bracy v. Kibbe*, 31 Barb. 273.

⁴ *Threadgool v. Litogot*, 22 Mich. 271.

⁵ *Watson v. Watson*, 58 Mich. 507.

⁶ *Thompson v. Clendening*, 1 Head, 287.

⁷ *Wooten v. Wilkins*, 39 Ga. 223; 99 Am. Dec. 456.

⁸ *Hopkins v. Mathias*, 66 Iowa, 333.

⁹ *Hewit v. Prime*, 21 Wend. 79; *Fox v. Stevens*, 13 Minn. 272; *Thompson v. Clendening*, 1 Head, 287.

¹⁰ *Wilson v. Sproul*, 3 Pa. St. 49.

visited her as a suitor, and used arts, flatteries, persuasions, and promises of marriage to induce her to have connection with him;¹ or that the defendant procured an abortion on the woman.² The jury may, in assessing damages, take into consideration the plaintiff's feelings, pain, and humiliation in giving birth to the child, but not the care and cost of maintaining and educating it.³ But in an action by the parent, evidence of a promise of marriage by the defendant is not admissible;⁴ nor of what the plaintiff told the woman he was worth.⁵

§ 1122. **Evidence in Mitigation.**—That others had criminal intercourse with the girl is admissible in mitigation of damages.⁶ So is evidence that the girl, prior to the seduction, was loose in language and conduct, and kept loose company,⁷ or of her general character for chastity;⁸ or that the parent was negligent;⁹ or that the defendant subsequently married the girl;¹⁰ but not her subsequent character and acts.¹¹ Where the father sues,

¹ *Stevenson v. Belknap*, 6 Iowa, 97; 71 Am. Dec. 392; *Russell v. Chambers*, 31 Minn. 54.

² *Klopper v. Bromme*, 26 Wis. 372; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100.

³ *Wilds v. Bogan*, 57 Ind. 453.

⁴ *Gillet v. Mead*, 7 Wend. 194; 22 Am. Dec. 578; *Wells v. Padgett*, 8 Barb. 327; *Brownell v. McEwen*, 5 Denio, 368; *Clark v. Fitch*, 2 Wend. 459; 20 Am. Dec. 639; *Foster v. Scofield*, 1 Johns. 299; *Whitney v. Elmer*, 60 Barb. 250; *Haynes v. Sinclair*, 23 Vt. 108; *Comer v. Taylor*, 82 Mo. 341. *Contra*, *White v. Campbell*, 13 Gratt. 573; *Phelin v. Kenderdine*, 20 Pa. St. 354.

⁵ *Watson v. Watson*, 53 Mich. 168; 51 Am. Rep. 111.

⁶ *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Smith v. Milburn*, 17 Iowa, 30; *Verry v. Watkins*, 7 Car. & P. 308; *Shattuck v. Myers*, 13 Ind. 47; 74 Am. Dec. 236. But *aliter* if defendant did not know it: *Lea v. Henderson*, 1 Cold. 146. The woman's chastity prior to the alleged seduction

is not to be presumed, but is a fact to be proved: *Bailey v. O'Bannon*, 28 Mo. App. 39.

⁷ *Carpenter v. Wall*, 11 Ad. & E. 803. Testimony that the girl had, previous to the time of the alleged seduction, introduced another party to her parents as her husband is immaterial as not tending to show unchaste conduct: *Burtis v. Chambers*, 51 Iowa, 645.

⁸ *Wallace v. Clark*, 2 Over. 93; 5 Am. Dec. 654; *Carder v. Forehand*, 1 Mo. 704; 14 Am. Dec. 317; *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Watry v. Ferber*, 18 Wis. 500; 86 Am. Dec. 789. By general reputation, but not by her reputation among a particular class of people: *Drish v. Davenport*, 2 Stew. 266. On the question of a girl's reputation for chastity, one may testify that he never heard anything against it, and that he never heard it talked about: *State v. Bryan*, 34 Kan. 63.

⁹ See *ante*, § 1118.

¹⁰ *Eicher v. Kistler*, 14 Pa. St. 282; 53 Am. Dec. 551.

¹¹ *McKern v. Calvert*, 59 Mo. 243.

evidence of his bad character is admissible by proof of general reputation;¹ but not of particular facts,² nor that he was devoid of natural sensibilities.³ Proof of gifts to the daughter is not admissible in reduction of damages, when not shown to have been applied to the benefit of plaintiff.⁴ In an action for the seduction of the plaintiff's reputed daughter, evidence that his marriage with his reputed wife is void is admissible on the defendant's part, to rebut a presumption of actual service, by showing that the plaintiff was not legally entitled to her services, and in mitigation of damages.⁵

But evidence is not admissible that he (the defendant) had offered to marry the girl;⁶ or of his general reputation for chastity;⁷ or of his good character, when there has been no attempt to impeach it;⁸ or that his general character is that of a modest and retiring man.⁹ The seduced girl may refuse to say, on cross-examination, whether she had connection with other men, either to show her bad character or to contradict her.¹⁰ So may witnesses refuse to testify as to having had criminal connection with her.¹¹

§ 1123. **Pleading.** — The petition in a parent's action for his daughter's seduction must aver her minority.¹²

¹ *Reed v. Williams*, 5 Sneed, 580; 73 Am. Dec. 157. *Contra*, *Dain v. Wyckoff*, 18 N. Y. 45; 72 Am. Dec. 493.

² *Reed v. Williams*, 5 Sneed, 580; 73 Am. Dec. 493.

³ *Grider v. Dent*, 22 Mo. 490.

⁴ *Russell v. Chambers*, 31 Minn. 54.

⁵ *Howland v. Howland*, 114 Mass. 517; 19 Am. Rep. 381.

⁶ *White v. Murtland*, 71 Ill. 250; 22 Am. Rep. 100; *Ingersoll v. Jones*, 5 Barb. 661.

⁷ *Watson v. Watson*, 53 Mich. 168; 51 Am. Rep. 111.

⁸ *Delvee v. Boardman*, 20 Iowa, 447.

⁹ *McRae v. Lilly*, 1 Ired. 118.

¹⁰ *Hoffman v. Kemerer*, 44 Pa. St. 452; *Doyle v. Jessup*, 29 Ill. 460;

Shattuck v. Myers, 13 Ind. 46; 74 Am. Dec. 236; *Reed v. Williams*, 5 Sneed, 580; 73 Am. Dec. 157; *Vaughn v. Perine*, 3 N. J. L. 728; 4 Am. Dec. 411. In an action for her own seduction, it is improper to ask her, on cross-examination, for the purpose of impeaching her character, if she had not had sexual intercourse with other men; but if a child had been born as the result of the alleged seduction, the inquiry is proper on the question of paternity, in order to mitigate the damages: *Smith v. Yaryan*, 69 Ind. 445; 35 Am. Rep. 232.

¹¹ *Vaughn v. Perine*, 3 N. J. L. 728; 4 Am. Dec. 411. Still their evidence is admissible: *Shattuck v. Myers*, 13 Ind. 46; 74 Am. Dec. 236.

¹² *Dodd v. Focht*, 72 Iowa, 579,

The complaint may allege the time of the acts of connection with a *continuando*, and evidence may be offered for any time covered by the complaint.¹ Special damage need not be alleged.² If the declaration avers the daughter to be the plaintiff's servant, it is good, although the averment of the daughter's infancy is omitted.³ A declaration alleging that the daughter was under twenty-one, and unmarried, at the time of the seduction, and that the plaintiff then was and still is entitled to her attentions and services, is a sufficient averment of the relation of master and servant.⁴ Under a count setting up generally loss of her service, he may recover for his mental suffering caused by the wrong.⁵ But the parent must allege and prove that the debauching was the result of seduction.⁶ Where an action is brought in the name of the mother, and the declaration alleges that she is authorized to bring it, but makes no claim for the loss of services, it will be regarded as the statutory action for the injury to the daughter, and the mother cannot recover.⁷ An averment of previous chastity, or of good repute for chastity, is not essential to the complaint in an action by an unmarried woman for her own seduction.⁸ Nor need the complaint particularly describe the means used to effect the seduction, nor need it aver that the woman relied on the seducer's promises.⁹

¹ *Lemmon v. Moore*, 94 Ind. 40. The complaint charged the seduction as having occurred at a certain date. There had been successive acts of intercourse, all under an engagement to marry, and the date named was that of the last act. Held, that the jury might consider the separate acts as the elements of the wrong consummated in the last, in which case there would be no variance: *Haymond v. Saucer*, 84 Ind. 3.

² *McIlvain v. Emery*, 88 Ind. 298.

³ *Applegate v. Ruble*, 2 A. K. Marsh. 128.

⁴ *Clem v. Holmes*, 33 Gratt. 722; 36 Am. Rep. 793; *Riddle v. McGinnis*, 22 W. Va. 253.

⁵ *Lunt v. Philbrick*, 59 N. H. 59.

⁶ *Smith v. Young*, 26 Mo. App. 575.

⁷ *Ryan v. Fralick*, 50 Mich. 483.

⁸ *Hodges v. Bales*, 102 Ind. 494.

⁹ *Hodges v. Bales*, 102 Ind. 494; *Brown v. Kingsley*, 38 Iowa, 220.

CHAPTER LVII.

INJURIES FROM INTOXICATING LIQUORS.

- § 1124. Injuries from intoxicating liquors — Civil damage laws.
- § 1125. Group one — Statutes of Maine, Connecticut, and Indiana.
- § 1126. Group two — Statutes of Arkansas, Massachusetts, Missouri, New Hampshire, Nebraska, North Carolina, Pennsylvania, Rhode Island, Vermont, and West Virginia.
- § 1127. Group three — Statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio, and Wisconsin.
- § 1128. Liability absolute — Lawfulness of sale immaterial.
- § 1129. Who liable — Master and servant — Principal and agent.
- § 1130. Joint liability.
- § 1131. Liability of owner or lessor of premises.
- § 1132. Who may sue — In general.
- § 1133. Injuries to person.
- § 1134. Injuries to property.
- § 1135. Injuries to means of support.
- § 1136. Exemplary damages.
- § 1137. Remote damages.
- § 1138. Mitigation of damages — Evidence.
- § 1139. Evidence in general.
- § 1140. Law and fact.
- § 1141. Pleading.
- § 1142. Defenses.

§ 1124. **Injuries from Intoxicating Liquors — Civil Damage Laws.** — Within recent years in a number of the states, statutes have been passed giving to the husband, wife, parent, child, or guardian, and sometimes to other parties, for injuries done by intoxicated persons, the right to maintain actions against the person or persons who may have sold or given the liquors which caused the intoxication. Also for injuries to means of support; for the expense and trouble of caring for the intoxicated person; and for other injuries and losses which are particularly pointed out in the statutes.¹

¹ In *King v. Henkie*, 80 Ala. 505, 60 Am. Rep. 119, it was held that a person who has ceased person cannot, under the statute authorizing an action to be brought for a wrongful act or omis-

§ 1125. Group One — Statutes of Maine, Connecticut, and Indiana. — The Maine law of 1858 contained a gen-

sion causing the death of another (Code Ala., sec. 2641), maintain an action against a retailer of intoxicating liquors who sells or gives them to a man of known intemperate habits who is helplessly drunk at the time, and the drinking of which causes his death almost instantaneously. The court thought that the proximate cause of the death was not the selling, but the drinking of the liquor, and that the contributory negligence of the deceased was, besides, a sufficient bar. The court say: "The selling or giving away of spirituous, vinous, or malt liquors, in any quantities whatever, to persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is, in this state, made a misdemeanor, and a license to sell or retail affords no protection to the guilty party: Code 1876, sec. 4205. The foregoing section of our code (sec. 2641), like many similar statutes in other American states, was evidently modeled after what is commonly known in England as Lord Campbell's Act, 9 & 10 Vict., c. 93, enacted by the British Parliament in the year 1846. The language there used was that, 'Whosoever the death of a person shall be caused by (any) wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.' The purpose of this and like legislation was clearly to correct a defect of the common law, by which it was well settled that a right of action based on a tort or injury to the person died with the person injured. Under this maxim, *Actio personalis moritur cum persona*, the personal representative of a deceased person

could maintain no action for loss or damage resulting from his death: *Hallenback v. R. R. Co.*, 9 Cush. 480; *Quinn v. Moore*, 15 N. Y. 436. The reason for the rule was said by Baron Parke, in a case arising before him under the English statute, to be, that, in the eye of the common law, 'the value of life was so great as to be incapable of being estimated by money.' The rule probably, however, rests on a broader basis. These statutes, it will be observed, each give a right of action only in cases where the deceased himself, if the injury had not resulted in his death, might have sustained a recovery. They continue, in other words, for the benefit of specific distributees 'a right of action which, at common law, would have terminated at the death, and enlarge its scope to embrace the injury resulting from the death': *Cooley on Torts*, 264. The condition that the action must be one which could have been maintained by the deceased, had it failed to produce death, or had not death ensued, has no reference to the nature of the loss or injury sustained, or the person entitled to recover, but to the circumstances attending the injury, and the nature of the wrongful act or omission which is made the basis of the action: *Saunders on Negligence*, 219; *South and North Ala. R. R. Co. v. Sullivan*, 59 Ala. 272, 281. As said in *Whitford v. R. R. Co.*, 23 N. Y. 465, where a similar phrase in the New York statute was construed, it 'is inserted solely for the purpose of defining the kind and degrees of delinquency with which the defendant must be chargeable in order to subject him to the action.' It necessarily follows, and has been accordingly decided with great uniformity by the courts, that where the negligence of the person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative under this statute, because the deceased himself would not have been entitled to recover had the injury not proved fatal: *Cooley on Torts*, 364; *Saunders on Negli-*

eral provision that any person not authorized under the act selling intoxicating liquors should be liable for all

gence, 215; 1 Addison on Torts, Wood's ed., p. 621, sec. 575; Savannah etc. R. R. Co. v. Shearer, 58 Ala. 672. We first observe that the case made by the complaint does not seem to us to fall within the letter or spirit of the statute, and the court below so decided on the demurrer. The death of the deceased was not 'caused' so much by the wrongful act of the defendants in selling him whisky, as by his own act in drinking it after being sold to him. The only wrongful act imputed to the defendants was the selling or giving, as the case may be, of intoxicating liquors to the deceased while he was in a stupidly drunken condition, knowing that he was a man of intemperate habits. It is not shown that the defendants used any duress, deception, or arts of persuasion to induce the drinking of the liquor. The act, however, as we have said, was a statutory misdemeanor. But this was only the remote, not the proximate or intermediate, cause of the death of plaintiff's intestate. The rule is fully settled to be, that 'if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote': Cooley on Torts, 68, 69; 1 Addison on Torts, 12, 13, secs. 10, 11. The statute under consideration was not intended to annul, but rather to preserve, this rule of the common law, so necessary to the certainty and justice of its administration, that there must be some proximate connection between the wrong done and the damage claimed to result from it, — that the two must be sufficiently conjoined so as to be 'concatenated as cause and effect,' as often said. Had it not been for the drinking of the liquor after the sale, which was a secondary or intervening cause co-operating to produce the fatal result, and was the act of deceased, not of

defendants, the sale itself would have proved entirely harmless. Hence it cannot be said that the wrongful act of the defendants in making the sale caused the death of King, but rather his own act in drinking it. And this must be true, whatever the condition of his mind, or state of his intellect, and without regard to the question of any contributory negligence on his part. The case, we repeat, is one not covered by the statute. The plaintiff is, moreover, in our opinion, debarred from recovery by the contributory negligence of the deceased, even admitting that the wrongful act of the defendants caused the death of King. It is shown that the deceased was helplessly drunk when he purchased and drank the liquor, so much so as to render the exercise of ordinary care by him impracticable, if not impossible. The presumption is, that this condition was brought about by his own voluntary or negligent act, by the persuasion or coercion of another. If we admit that the state of mind thus produced was analogous to that of one *non compos* or insane, so that the deceased was in mental darkness, and so unconscious as to be at the moment incapable of knowledge or consent, thus rendering him morally unaccountable, yet the fact confronts us that this condition was the result of his own negligence or wantonness, and without it the accident of his death would not probably have occurred. The deceased, by the exercise of ordinary care, might have escaped making himself helplessly drunk. By not doing so he was the author of his own death, in view of the fact that it does not appear that the defendants, after the fatal draught was taken, could, by the exercise of ordinary care, or even by any practicable means at hand, have avoided the consequences of death, which almost instantly followed. This involved every element of contributory negligence, and was sufficient to prevent a recovery by the deceased, had death not ensued: Railway Accident Law (Patterson), 74; Illinois Cent. R. R.

injuries committed by the person to whom the liquor was sold, while intoxicated, to be recovered in an action on the case;¹ and a statute of Connecticut contains a somewhat similar provision.² A statute of Indiana, passed in 1853, but repealed two years later, gave a like remedy,³ limited, however, to a suit on the bond of the vendor,⁴ and to the case of a licensed retailer.⁵ In 1873 an act was passed, giving to the wife, child, parent, husband, guardian, employer, or other person a right of action, for injuries caused to them by the sale of intoxicating liquors, against the seller, and the landlord of the premises where the sale took place. This was, however, repealed in 1875 by an act which restricts the right of action to damages caused by sales in violation of law.⁶

Co. v. Cragen, 71 Ill. 177; Cramer v. Burlington, 42 Iowa, 315; Wharton on Negligence, sec. 332. We have thus hypothetically admitted the contention of appellant's counsel, that one drunk to unconsciousness is to be placed upon the same ground as infants of tender years, persons *non compos* or insane, so far as concerns the question of plaintiff's contributory negligence. The contrary of this, however, would seem to be true, as the basis of the rule governing the latter classes is that of moral accountability. Imbeciles, lunatics, and infants are not accountable morally for the states of their minds, and yet the law governing the subject of contributory negligence, even as applicable to them, is admitted to be in a very unsatisfactory and doubtful state: Cooley on Torts, 680-682. A drunkard, or one in a state of voluntary intoxication, can scarcely claim so much charity from the law in this particular as imbeciles and lunatics, because he has by his own agency, either wantonly or negligently, brought about his own misfortune. As drunkenness is no excuse for crimes, or for torts, no more should it be a basis for the liability of another in an action brought against him by the victim of

such inebriety. The case of McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260, referred to by appellant's counsel as an authority to support the present action, although analogous to it in some respects, is broadly distinguishable from it in one important particular. There the death of the deceased was brought about by the defendants conspiring together to induce and persuade the deceased to swallow a large amount of whisky, he being already so drunk as to be deprived of his reason and to be rendered incapable of resistance, the draught being thus imposed upon him in his helpless condition. The case was made to rest on the ground that the administration of the deadly draught, like that of a noxious drug, was an assault, the deception by which it was accomplished being a fraud on the party's will, equivalent to force in overpowering it: Com. v. Stratton, 114 Mass. 303; 19 Am. Rep. 330."

¹ Me. Rev. Stats. 1871, p. 304, sec. 32.

² Rev. Stats. 1887, sec. 3101.

³ Act of March 4, 1853, p. 88, sec. 10.

⁴ Martin v. West, 7 Ind. 657.

⁵ Struble v. Nodwift, 11 Ind. 65.

⁶ Indiana act of March 17, 1875. (Acts Special Session, 1875, p. 55).

§ 1126. Group Two¹—Statutes of Arkansas, Massachusetts, Missouri, New Hampshire, Nebraska, North

¹ *Arkansas*.—An act applying to Washington County only provides that “every husband, wife, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication of any person, habitual or otherwise, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors in said county of Washington, in whole or in part, of such person or persons, and recover full damages”; Laws 1873, p. 385.

Massachusetts.—“If a person in a state of intoxication commits an assault and battery, or injures property, whoever furnished him with any part of the liquor which occasioned his intoxication, if the same was furnished in violation of this act, shall be liable to the same action by the party injured as the person intoxicated would be liable to; and the party injured, or his or her legal representative, may bring either a joint action against the person intoxicated and the person who furnished the liquor, or a separate action against either. Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor in an action of tort. The husband, wife, parent, child, guardian, or employer of any person who has, or may hereafter have, the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified, at any time within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of tort, recover of

the person notified such sum, not less than one hundred nor more than five hundred dollars, as may be assessed as damages; provided, the employer giving said notice shall be injured in his person or property. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator”: Stats. 1875, p. 668, secs. 14, 15, 16. A subsequent section provides that “the terms ‘intoxicating liquor,’ or ‘liquors,’ in this act shall be construed to include ale, porter, strong beer, lager-beer, cider, and all wines, as well as distilled spirits”: Sec. 18. The notice under this statute need not follow its exact language: *Kennedy v. Saunders*, 142 Mass. 9. It need not state that the husband is in the habit of drinking to excess: *Tate v. Donnavan*, 143 Mass. 590.

Missouri.—The statutes require of every dram-shop keeper a bond, and provides that if he shall “sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors, in any quantity, to any minor, without the permission of the parent, master, or guardian of such minor first had and obtained,” he shall forfeit and pay to such parent, master, or guardian, for every such offense, fifty dollars, to be recovered by civil action, or in the name of the county on the bond: Gen. Stats. 1865, p. 421, sec. 20.

New Hampshire.—“If the husband, wife, parent, child, brother, sister, or other near relative, guardian, or employer of any person who has the habit of drinking spirituous liquors to excess shall give notice in writing, by him or her signed, to any person not to furnish any spirituous liquor to the person who has such habit; if the person so notified shall furnish any spirituous liquor, for a consideration or otherwise, to the person who has such habit, at any time within one year after such notice given,” the person giving the notice may recover not less than

Carolina, Pennsylvania, Rhode Island, Vermont, and West Virginia.—In Arkansas, Massachusetts, Missouri, New

fifty dollars nor more than five hundred dollars: Rev. Stats. 1867, p. 210, sec. 22. "Whenever any person in a state of intoxication shall commit any injury upon the person or property of any other individual, any person who, by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to, and both such parties may be joined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent," may recover all damage or loss in consequence thereof from the person unlawfully furnishing the liquor: Laws 1870, p. 403.

Nebraska.—"The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributable to his retail traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section five hundred and seventy-two, a copy of which, properly authenticated, shall be taken in evidence in any court of justice in this state; and it shall be the duty of the county clerk to deliver, on demand, such copy to any person who may claim to be injured by such traffic. It shall be lawful for any married woman, or other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when col-

lected shall be paid over for the use of herself and children. . . . On the trial of any suit under the provisions hereof the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person in quantities sufficient to produce intoxication, or when under the influence of liquor": Gen. Laws 1873, p. 853, secs. 576, 577, 579.

North Carolina.—"The father, or if he be dead, the mother, guardian, or employer, of any minor to whom sale or gifts shall be made in violation of this act, shall have a right of action in a civil suit against the person or persons so offending by such sales or gifts; and upon proof of any such illicit sales or gifts, shall recover from such party or parties so offending such exemplary damages as a jury may assess, provided such assessment shall be not less than twenty-five dollars": Laws 1873-74, p. 94, sec. 2.

Pennsylvania.—"The husband, wife, parent, child, or guardian of any person who has, or may hereafter have, the habit of drinking intoxicating liquor to excess may give notice in writing, signed by him or her, to any person not to sell or deliver intoxicating liquor to the person having such habit; if the person so notified at any time within twelve months after such notice sells or delivers any such liquor to the person having such habit, the person giving the notice may, in an action of tort, recover of the person notified any sum not less than fifty nor more than five

Hampshire, Nebraska, North Carolina, Pennsylvania, Rhode Island, Vermont, and West Virginia, statutes somewhat similar in effect are in force.

hundred dollars, as may be assessed by the court or judge as damages. A married woman may bring such action in her own name, notwithstanding her coverture, and all damages recovered by her shall go to her separate use. In case of the death of either party, the action and right of action given by this section shall survive to or against his executor or administrator without limit as to damages": Laws 1875, p. 41, sec. 7.

Rhode Island. — "If any person in a state of intoxication commits any injury to the person or property of another, the person who furnished him with any part of the liquor which occasioned his intoxication, if the same was furnished in violation of this act, shall be liable to the same action by the party injured as the person intoxicated would be liable to; and the party injured, or his or her legal representative, may bring either a joint action against the person intoxicated and the person who furnished the liquor, or a separate action against either." "The husband, wife, parent, child, guardian, or employer of any person who has, or may hereafter have, the habit of drinking intoxicating liquor to excess may give notice in writing, signed by him or her, to any person, requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified at any time within twelve months thereafter sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of trespass on the case, recover of the person notified such sum as may be assessed as damages, provided the employer giving said notice shall be injured in his person, business, or property. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or

administrator": Laws 1875, p. 24, secs. 32, 34.

Vermont. — "Whenever any person by reason of intoxication shall commit or cause any injury upon the person or property of any other individual, any person who, by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to; and both such parties may be joined in the same action, and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquors unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid all damage or loss sustained in consequence of such injury, in any court having jurisdiction in such cases; and coverture or infancy shall be no bar to proceedings for recovery in any case arising under this act, and no person shall be disqualified as a witness by reason of the marriage relation in any proceeding under this act": Act of 1869, Amended Laws 1874, p. 53.

West Virginia. — "Any husband, wife, child, parent, or guardian may serve upon any person engaged in the sale of intoxicating liquors a written notice not to sell or furnish such liquors to the wife, husband, child, parent, or ward of the person giving such notice; and thereafter, if the person so served with such notice shall, by himself or another, sell or furnish such liquors to the person named in such notice, and by reason thereof the person to whom such liquor is sold or furnished shall become intoxicated, and, while in that condition, do damage to another, or

§ 1127. **Group Three — Statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio, and Wisconsin.** — In Illinois,¹ Iowa,² Kansas,³ Michigan,⁴ New York,⁵ Ohio,⁶ and Wisconsin,⁷ the statutes give a right of action for the consequence of the intoxication, without regard to the unlawfulness of the sale, and make no distinction between a sale and a gift. They provide that every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such persons, for all damages sustained from the effect of such intoxication, and for exemplary damages.⁸

§ 1128. **Liability Absolute — Lawfulness of Sale Immaterial.** — Under the statutes of the states of the Third Group, the liability for the sale or gift is absolute; it

shall, by reason of such intoxication, injure any person in his or her means of support who may have the legal right to look to him therefor, upon due proof that such liquors were sold or furnished as aforesaid, and that the person mentioned in said notice was, at the time of service thereof, in the habit of drinking to intoxication, an action may be maintained by the husband, wife, child, parent, or guardian of the person mentioned in said notice, or other person injured by him as aforesaid, against the person selling or furnishing him such liquors, as well as for all such damages as the plaintiff has sustained by reason of the selling or giving of such liquors, as for exemplary damages; and if the person so proceeded against has given the bond and security hereinafter provided for, such suit may be brought and prosecuted upon such bond against

him and his sureties therein. Such suit may be brought and prosecuted by a married woman in any case where the person mentioned in such notice is her husband or infant child, and the damages recovered therein shall be her sole and separate property, and governed by the provisions of the code of West Virginia, in relation to the separate property of married women": Laws 1877, p. 144, sec. 16.

¹ Rev. Stats. 1874, p. 438.

² Code 1873, secs. 1556 et seq.

³ Gen. Stats. 1868, p. 399.

⁴ Gen. Laws, 1875, p. 284.

⁵ Laws 1873, c. 646.

⁶ Laws 1875, p. 35.

⁷ Laws 1874, p. 303.

⁸ Such a remedy did not exist by the rules of the common law. See Lawson on Civil Remedies, Intoxicating Liquors, 1, 3; *Woody v. Coenan*, 44 Iowa, 19.

does not depend upon its unlawfulness,¹ as in the other group, where the remedy is given only when the transaction has been in violation of law, such as a sale by an unlicensed person, or to a minor or habitual drunkard, or after notice of his habits. It is no defense that the defendant was licensed to sell intoxicating liquors.² But the defendant may nevertheless show that he had been licensed to sell spirituous liquors, and was legally selling them under that authority on the occasion complained of, not as a defense, but in mitigation of damages.³ It is not necessary that the party selling should compel the purchaser to drink, or use any art, device, or trick to cause him to become intoxicated, or know that he would become so.⁴ These statutes are to be construed strictly.⁵

§ 1129. Who Liable — Master and Servant — Principal and Agent. — The words “any person,” as used in the statutes, are very broad, and embrace all persons making the sale, without regard to their capacity, — whether owner, son, clerk, or servant.⁶ The master is liable for a sale made by his servant, even though in the particular case, the servant having a general authority to sell liquor, he disobeyed the orders of the master.⁷ A clerk or salesman who sells liquor is a joint wrong-doer with his principal, and may be joined in an action with him.⁸ But

¹ *Hayes v. Phelan*, 4 Hun, 773. *Contra*, *Baker v. Beckwith*, 29 Ohio St. 315; *Sibila v. Bahney*, 34 Ohio St. 399.

² *Horning v. Wendell*, 57 Ind. 172; *Baker v. Pope*, 2 Hun, 556; *Quain v. Russell*, 12 Hun, 376. Nor is it necessary that an action should also be maintainable against the intoxicated person: *Quain v. Russell*, 8 Hun, 319.

³ *Lawson on Civil Remedies — Intoxicating Liquors*, 16.

⁴ *Barnaby v. Wood*, 50 Ind. 405.

⁵ *Freese v. Tripp*, 70 Ill. 496; *Merdel v. Anthis*, 71 Ill. 241; *Kellerman v. Arnold*, 71 Ill. 632; *Fentz v. Meadows*, 72 Ill. 540; *Hayes v. Phelan*, 4 Hun, 773.

⁶ *Worley v. Spurgeon*, 38 Iowa, 465; *State v. Stucker*, 33 Iowa, 395.

⁷ *Peterson v. Knoble*, 35 Wis. 80; *Smith v. Reynolds*, 8 Hun, 128; *Keedy v. Howe*, 72 Ill. 133; *George v. Gobey*, 128 Mass. 289; 35 Am. Rep. 376; *Kehrig v. Peters*, 41 Mich. 475. But this principle cannot be applied to the case of a person who goes without the permission of any one and drinks another's beer; and the fact that the owner afterwards demanded and received pay for the property cannot make such owner a wrong-doer in the original trespass on his rights; *Kreiter v. Nichols*, 28 Mich. 496.

⁸ *Barnaby v. Wood*, 50 Ind. 405; *English v. Beard*, 51 Ind. 489.

the words "causing intoxication by selling or giving," etc., does not give a right of action against a person not engaged in the liquor traffic who treats another to a glass of liquor with no purpose of gain or profit.¹

§ 1130. **Joint Liability.**—A seller of intoxicating liquors by which another is injured in person, property, or means of support is not released from liability because a part of the liquors causing the intoxication was sold by others. He is liable if he contributed to the result.² It is no defense that only one of the two or more drinks causing the intoxication was sold by the defendant.³ The damages cannot be lessened, nor can the liability be apportioned, merely because the injury was due in part to the acts of others than defendant.⁴ But the rule is different where the wrongs are successive and independent, though committed against the same person.⁵ Thus if defendant sold liquor, and plaintiff's husband became sober after getting drunk, and then got drunk again on liquor sold by another party, and the injury then ensued, defendant cannot be held accountable.⁶ The defendant is only liable for all the damages to which he contributed, even though it be difficult to separate from them the damages to which he did not contribute.⁷ The sale by one defendant of liquors to a person becomes an independent and complete cause of action, and a sale to him of intoxicating liquors by another person on the next day, the next week,

¹ *Aden v. Cruse*, 21 Ill. App. 391.

² *Woolheather v. Risley*, 38 Iowa, 486; *Fountain v. Draper*, 49 Ind. 441; *Hackett v. Smelsey*, 77 Ill. 109; *Emery v. Addis*, 6 Chic. L. N. 336; *Bodge v. Hughes*, 53 N. H. 616; *Jewett v. Wanshura*, 43 Iowa, 574; *Kearney v. Fitzgerald*, 43 Iowa, 580. *Boyd v. Watt*, 27 Ohio St. 259; *Roose v. Perkins*, 9 Neb. 304; 31 Am. Rep. 409; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Kerkow v. Bauer*, 15 Neb. 150; *Bryant v. Tidgewell*, 133 Mass. 86; *Buckworth v. Crawford*, 24 Ill. App. 603;

Mayers v. Smith, 25 Ill. App. 67; *Cox v. Newkirk*, 73 Iowa, 42.

³ *Werner v. Edmiston*, 24 Kan. 147; *Rantz v. Baines*, 40 Ohio St. 43.

⁴ *Steele v. Thompson*, 42 Mich. 594.

⁵ *La France v. Krayner*, 42 Iowa, 143; *Jewett v. Wanshura*, 43 Iowa, 574.

⁶ *Barks v. Woodruff*, 12 Ill. App. 96.

⁷ *Huggins v. Kavanagh*, 52 Iowa, 368; *Flint v. Gauer*, 66 Iowa, 696; *Welch v. Jugenheimer*, 56 Iowa, 11; 41 Am. Rep. 77; *Appelgate v. Winebrenner*, 67 Iowa, 235.

or the next month, would not give a joint right of action for either the first or last sale. Each is complete in itself.¹ So where the injury resulting from the sale of intoxicating liquors proceeds, not from a particular act of intoxication, but rather from a general besotted condition, those who may have contributed to such condition by the sale of the liquors are not jointly liable with those who may have contributed to the immediate act.² So if A sells to B, and B to C, and C, being thereby intoxicated, injures D, D can recover from B, but not from A.³

§ 1131. **Liability of Owner or Lessor of Premises.** — Under the statutes of Illinois, Michigan, New York, and Ohio, any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased a building for other purposes shall permit the sale of intoxicating liquors therein, which may have caused, in whole or in part, the intoxication of any person, is made liable, severally or jointly, with the person or persons selling or giving the intoxicating liquors for all damages that may be sustained from such sale or gift, and likewise for exemplary damages.⁴ By the Illinois, Iowa, and Ohio statutes, the premises in which the sale is made are liable, and a judgment obtained under the acts becomes a lien upon the property, whether owned by the person who sold or gave away the liquor, or by one who has rented it to be used for the sale of intoxicating liquors, or, though leased or rented for another purpose, permits it to be used in such manner;⁵ and proceedings may be had to subject the premises to the payment of a

¹ *La France v. Krayner*, 42 Iowa, 143.

² *Hitchner v. Ehlers*, 44 Iowa, 40; *Tetzner v. Naughton*, 12 Ill. App. 148; *Richmond v. Shickler*, 57 Iowa, 486.

³ *Bush v. Murray*, 66 Me. 472.

⁴ Rev. Stats. Ill., c. 43, sec. 9;

Mich. Laws of 1871, vol. 1, c. 69, sec. 2; N. Y. Laws of 1873, c. 646, sec. 1; Saylor's Ohio Stats. 2360, sec. 7; *Schroeder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236.

⁵ Rev. Stats. Ill., c. 43, sec. 10; Code of Iowa, sec. 1558; Saylor's Ohio Stats., 2364, c. 1871.

judgment, either before or after execution is issued against the property of the person against whom the judgment may have been recovered. And if the building or premises belong to a minor, or other person under disability, the guardian or conservator of such person, and his real and personal property, are liable in the place and stead of the property of his ward. In Illinois, Ohio, New York, and Michigan, the sale or gift of intoxicating liquors contrary to the provisions of the act works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises where such unlawful sale or gift takes place.¹ The court of chancery under the last statute is authorized to enjoin the sale or gift of intoxicating liquors, by any lessee of premises, which may result in liability on the part of the lessor. While the plaintiff may bring an action against the seller of liquors causing intoxication and damage alone, and, having recovered judgment by another action against the owner, enforce it, yet he has the right to join them in one action, and therein obtain complete relief.² And the judgment so recovered may be reversed as to one and affirmed as to the other.³ Exemplary damages may be recovered against the lessor on proof authorizing their recovery against the lessee.⁴ This part of the law, however, does not apply to the owner of premises who himself sells liquor therein. Therefore where the owner sells in violation of the act, he is liable because of his sales, and not on account of his ownership of the premises in which the sales are made.⁵ But a wife owning a building, and knowingly permitting her husband to carry on the business of selling intoxicating liquor therein, is liable, although her title and the joint possession were acquired before the passage of the

¹ Rev. Stats. Ill., c. 43, sec. 10; N. Y. Laws of 1873, c. 646, sec. 1; Saylor's Ohio Stats. 2360, sec. 7; Mich. Laws of 1871, c. 69, sec. 2.

² *La France v. Krayner*, 42 Iowa,

143; *Loan v. Hurney*, 53 Iowa, 89.

³ *Reugler v. Lilly*, 26 Ohio St. 48.

⁴ *Reid v. Terwilliger*, 42 Hun, 310.

⁵ *Barnaby v. Wood*, 50 Ind. 405.

act.¹ The statutes will not be construed to make liable those having only reversionary and contingent interests, and who do not control the letting.² What will amount to knowingly permitting or suffering liquor to be sold on the premises on the part of one who has leased them for legal purposes is a question of some doubt.³ Some act on his part signifying his assent to the use seems to be essential.⁴ But the consent of the owner need not be shown by any positive affirmative act.⁵ General reputation of the place being used for the purpose of selling spirituous liquors is admissible on the question of the defendant's knowledge.⁶ Where it was proved that the defendant by a written lease let a building to one F. for the sale of liquor, on an understanding that F. was to occupy it for that purpose, and F. did occupy it for that purpose, it was held that such facts would sustain an allegation of "suffering" the premises to be occupied for the purposes named, as well as an allegation of "letting" for a like purpose.⁷

Where a landlord seeks to avoid a lease for a violation of the statute, the defendant cannot prevent such avoidance by showing a payment of rent for the entire term.⁸ If the sale be made on any part of the leased property, it works a forfeiture of the whole.⁹ The owner may dispos-

¹ *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386.

² *Castle v. Fogerty*, 19 Ill. App. 442.

³ See *Granger v. Knepper*, 1 Cin. Rep. 480.

⁴ *State v. Ballingall*, 42 Iowa, 87; *State v. Abrahams*, 6 Iowa, 117; 71 Am. Dec. 399; *Zurk v. Grant*, 25 Ohio St. 352; *Mead v. Stratton*, 8 Hun, 148; *Meyers v. Kirt*, 57 Iowa, 421; *Cobleigh v. McBride*, 45 Iowa, 116.

⁵ *Loan v. Etzel*, 62 Iowa, 429.

⁶ *State v. Shanahan*, 54 N. H. 437.

⁷ *State v. Shanahan*, 54 N. H. 437.

⁸ *McGarvey v. Puckett*, 27 Ohio St. 669. Where a tenant uses leased premises for the unlawful sale of

liquor, whereby, under the act of April 18, 1870 (67 Ohio Laws, 101), he forfeits his lease, the landlord may maintain an action of forcible detention before a justice to recover the premises. He is not required to sue in equity. So held where the landlord was not chargeable with leasing the premises for the unlawful business: *Justice v. Lowe*, 26 Ohio St. 372. Where an owner is sued for an injury under the statute, a justice of the peace has no jurisdiction, as it is an action in which the title to real estate is involved: *Bowers v. Pomeroy*, 21 Ohio St. 184.

⁹ *McGarvey v. Puckett*, 27 Ohio St. 672.

sess his lessee from the whole, notwithstanding the wrong-doer is not complainant's immediate lessee, but is a subtenant, and of a part only of the building.¹

The provisions of the statute declaring that real estate not owned by the seller, but whereon the sale is made, shall be held liable for the payment of a judgment against him do not create a lien upon the property, but simply authorize it to be subjected to the payment of the judgment in a suit against the owner instituted for that purpose. Until the commencement of a suit against him, the judgment creditor acquires no interest in the property; and if before the suit is brought it has been sold and conveyed, it cannot be subjected to the payment of such a judgment.² In an action to enforce the lien, the former judgment is evidence that the judgment was rendered, but not of the amount for which the property is to be subjected, as against the owner, who was not a party to the original proceedings.³ Where in a joint action against several defendants different judgments are rendered upon separate trials against the several defendants, the plaintiff must elect upon which of the judgments he will rely, as a lien upon the premises where the sale took place, as the satisfaction of one judgment discharges the rest.⁴

§ 1132. Who may Sue — In General. — The action under these statutes is not given on the ground of mere relationship: it extends to all who have been injured in person, property, or means of support.⁵ The right of action is not restricted to a single person for a single injury, but extends to a husband, wife, children, or other

¹ *People v. Bennett*, 14 Hun. 63.

² *Bellinger v. Griffith*, 23 Ohio St. 619.

³ *Buckham v. Grape*, 65 Iowa, 535.

⁴ *Putney v. O'Brien*, 53 Iowa, 117.

⁵ *Ganssly v. Perkins*, 30 Mich. 495. The action lies by a wife only where,

by the selling of liquors to a drunken husband, she has been injured in person or property or means of support; and where no injury in either of these respects is proved, no recovery can be had: *Fentz v. Meadows*, 72 Ill. 540.

persons who are injured, be they ever so many.¹ The action given to the "parent" of a minor to whom liquor has been sold may be maintained by his mother without proof that he has no father;² and a man of twenty-four who is not dependent on his father is a "child" within the same statute.³ The husband may sue for injury to his means of support by the intoxication of his wife.⁴ Under a statute declaring that licensed liquor-sellers "shall pay all damages that the community or individuals may sustain in consequence of such traffic," one who voluntarily goes to a licensed liquor-saloon, and buys and drinks liquor, and from its effects becomes stupefied and unconscious, and frozen while so stupefied, has a right of action against the seller.⁵ But under a statute giving to "every wife, child, parent, guardian, husband, or other person" a right of action for injury by reason of the intoxication of any person against the seller of the liquors, the intoxicated person himself has no right of action against the seller for money stolen from him when drunk.⁶ The wife may sue after the death of the husband, and his death does not abate a suit already commenced.⁷ She need not be a wife at the time of bringing the suit, if she was at the time of the wrongful act.⁸ Under an act giving an action to one "dependent" on the deceased, a plaintiff claiming to be his widow must show a lawful marriage, and one claiming to be his child must show his legitimacy.⁹ Where by statute a father is required to support his adult pauper son, he may sue for injuries to him under the statute.¹⁰

¹ *Franklin v. Schermerhorn*, 8 Hun, 112.

² *McNeil v. Collinson*, 130 Mass. 167.

³ *Taylor v. Carroll*, 145 Mass. 95.

⁴ *Moran v. Goodwin*, 130 Mass. 158; 39 Am. Rep. 443.

⁵ *Buckmaster v. McElroy*, 20 Neb. 557; 57 Am. Rep. 843.

⁶ *Brooks v. Cook*, 44 Mich. 617; 38 Am. Rep. 282.

⁷ *Hackett v. Smelsley*, 77 Ill. 109; *Roose v. Perkins*, 9 Neb. 304; 31 Am. Rep. 409.

⁸ *Schneider v. Hosier*, 21 Ohio St. 116; *Jackson v. Brookins*, 5 Hun, 530.

⁹ *Good v. Towns*, 56 Vt. 410; 48 Am. Rep. 799.

¹⁰ *Clinton v. Laning*, 61 Mich. 355.

In some of the states a stated compensation is permitted to be recovered against the seller by one taking care of the intoxicated person while so intoxicated.¹ It is held that a wife may recover under this section the stated compensation in addition to injury to person, property, or means of support.² But this section of the statute giving a stated sum per day for taking charge of and providing for the intoxicated person has no application to the case of intoxication caused by liquors given to him.³ The sum can only be recovered in an action of debt as prescribed in the statute,⁴ and the sum named in the statute is the limit of the recovery.⁵ Plaintiff is entitled to recover for taking care of the intoxicated person only for the time he remains intoxicated.⁶ A physician who treats professionally a person who is injured while intoxicated does not "take charge of and provide for" such person within the meaning of the statute.⁷ In actions under these statutes, the intoxicated person is not a necessary party defendant.⁸ When the wife sues for injuries to her person or means of support she need not join her husband as plaintiff.⁹ Where the statute, while giving a right of action to those injured in their means of support, etc., makes no mention of a joint right of action, infant children injured by sales to their father cannot join, but must bring separate actions.¹⁰ The cause of action under the Maine statute is not assignable.¹¹

§ 1133. **Injuries to the Person.**—The fact that defendant has continually sold liquor to plaintiff's husband against her request does not give her a right of action;¹²

¹ Kansas, 1 Doss. Stats., c. 35, sec. 9; Illinois, Rev. Stats., c. 43, sec. 8; Iowa, Code 1873, sec. 1556; Ohio, 2 S. & C. 1431, sec. 6; Brannan v. Adams, 76 Ill. 335.

² Wightman v. Devere, 33 Wis. 570.

³ Brannan v. Adams, 76 Ill. 331.

⁴ Confrey v. Stark, 73 Ill. 187.

⁵ Brannan v. Adams, 76 Ill. 331.

⁶ Krach v. Heilman, 53 Ind. 517.

⁷ Sansom v. Greenough, 55 Iowa, 127.

⁸ English v. Beard, 51 Ind. 489.

⁹ Mitchell v. Ratts, 57 Ind. 259.

¹⁰ Durein v. Pontious, 34 Kan. 353.

¹¹ McGee v. McCann, 69 Me. 79.

¹² McEntee v. Spiehler, 12 Daly, 435.

nor does his mere intoxication;¹ nor does the death of the husband alone.² There must be such an injury as the statute describes, which is, in most of the statutes, an injury to the person, property, or means of support of the plaintiff. To sustain the action for injuries to the person, an assault, or some actual violence or physical injury to the person or health, must be shown.³ Anguish, mental distress, or pain of mind, or the feelings suffered by a wife by reason of her husband's intoxication, or the loss of social standing, are not elements of damages.⁴ And

¹ *Confrey v. Stark*, 73 Ill. 187.

² *Brookmire v. Monaghan*, 15 Hun, 16.

³ *Mulford v. Clewell*, 21 Ohio St. 193; *Wilson v. Booth*, 57 Mich. 249; *Calloway v. Laydon*, 47 Iowa, 456; 29 Am. Rep. 489, the court saying: "We have then the question whether threats and vulgarity directed by the husband to the wife, unaccompanied by physical injury, will entitle her to recover actual damages, and if not, whether they will entitle her to recover exemplary damages. In *Mulford v. Clewell*, 21 Ohio St. 196, which arose under a statute similar to ours, the court below, in instructing the jury upon the subject of injury to the plaintiff's person, said: 'Mortification and sorrow, and loss of her husband's society, are not enough. They are misfortunes for which she has no remedy under this law. If she had been attacked by her drunken husband, and injured in her person by his violence, she could recover.' On appeal this instruction was approved. A similar statute in Illinois is construed in the same way: *Freese v. Tripp*, 70 Ill. 503. In the case at bar, the court attempted to discriminate between the mental suffering experienced by the wife from language and conduct of the husband not directed towards her and the suffering from language and conduct which were directed towards her. The words 'in person' are not understood by the court below to mean in body. An injury in person is understood to be synonymous with personal injury. Vulgar conduct of the hus-

band in general, however mortifying and painful to her feelings, is thought by the court not to be a personal injury, but becomes so when it is directed to a person. We are of the opinion that the court misconceived the meaning of the words 'in person.' We think that they mean in body. That was evidently the view of the court in *Mulford v. Clewell*, above cited. The statute gives a right of action to any one who shall be injured in person. To hold that it was designed to give a right of action to every one to whom a threatening or vulgar remark should be addressed by an intoxicated person would, in our opinion, be putting a construction upon the statute of which it is not properly susceptible. If we are correct, then, threatening language or vulgar conduct, although directed to the plaintiff, but not resulting in the impairment of her health, does not constitute a ground for the recovery of actual damages, and the court erred in instructing the jury that they might be considered in that connection."

⁴ *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Fentz v. Meadows*, 72 Ill. 540; *Confrey v. Stark*, 73 Ill. 187; *Koerner v. Oberly*, 56 Ind. 284; 26 Am. Rep. 34; *Jackson v. Noble*, 54 Iowa, 641. But *aliter* under a statute giving exemplary damages to the wife "who shall be injured in person, property, means of support, or otherwise, . . . by reason of the intoxication of any person": *Friend v. Dunks*, 37 Mich. 25.

mere abuse is not enough.¹ So the fact that a husband, when intoxicated, called his wife a prostitute in the presence of her neighbors, and threatened to kill her, in the absence of proof that his conduct impaired her health, does not constitute a ground for the recovery of damages in her action against the liquor-seller.² Where the husband, while intoxicated, without actual violence, but by threats and abusive language and intimidation, drove his wife out of his house, and kept her out for several hours, it was held that this constituted a physical injury and suffering sufficient to sustain an action.³

§ 1134. **Injuries to Property.**—Under this phrase in the statutes, suit may be brought for the squandering by the drunkard of the money or chattels of the wife or other person;⁴ for property destroyed by a person while drunk;⁵ as while drunk for driving a horse so violently that it died.⁶ A party may sue for money paid during a period of time for liquor sold to him in violation of these statutes. And the same right exists in favor of his personal representatives, it being an injury to the estate of the intestate of a proprietary character, as distinguished from a mere personal injury.⁷ No demand of the chattels, or notice of claim, is necessary before the suit can be brought.⁸ If, as between the wife suing as the plaintiff and the husband, the property was hers, whether it would have been hers as to creditors or a purchaser from her husband in possession is not material; for the defendant in such a proceeding does not occupy either of these relations.⁹ An action may

¹ *Albrecht v. Walker*, 73 Ill. 69; *Welch v. Jugenheimer*, 56 Iowa, 11; 41 Am. Rep. 77.

² *Calloway v. Laydon*, 47 Iowa, 456; 29 Am. Rep. 489.

³ *Peterson v. Knoble*, 35 Wis. 80; *Wightman v. Devere*, 33 Wis. 570; *Ward v. Thompson*, 48 Iowa, 588.

⁴ *Mulford v. Clewell*, 21 Ohio St. 197; *Hemmens v. Bentley*, 32 Mich. 89.

⁵ *Woolheather v. Risley*, 38 Iowa, 187.

⁶ *Bertholf v. O'Reilly*, 8 Hun. 16; *Dunlap v. Wagner*, 85 Ind. 529; 44 Am. Rep. 42.

⁷ *Kilburn v. Coe*, 48 How. Pr. 141. ⁸ *Mulford v. Clewell*, 21 Ohio St. 197.

⁹ *Woolheather v. Risley*, 38 Iowa, 187.

be maintained by a person prevented from following his usual occupation by being struck, beaten, or wounded by an intoxicated person.¹ So where defendant sold liquor to plaintiff's son-in-law, who, becoming intoxicated, drove a team, behind which plaintiff's wife was riding, so recklessly as to upset the wagon and break the wife's arm, the plaintiff was held entitled to recover for the loss of her services and the expenses of medical attendance, etc.²

§ 1135. **Injuries to "Means of Support."**—The phrase "means of support," as used in the statutes in reference to the damages suffered by the wife, relates to whatever the husband might have earned or made by his labor and attention to business and contributed to the family support.³ Thus mere intoxication affecting in any way his capacity to labor will give the wife a right of action.⁴ So where sickness or insanity results from the intoxication.⁵ If the death of the husband is shown to have resulted from intoxication produced by liquors sold or given to him by the defendant, in the absence of contrary proof, the jury may infer an injury to her means of support. This would shift the burden of proof, and entitle her to at least nominal damages.⁶ It is actionable to destroy a man's health and ability to labor, — his power to accumulate future means of support,⁷ — since where he has been able to work, and his wife depends on him, his disability is an injury to her means of support, and the more so if he becomes a burden on her by putting her to expense for care and medical attendance on his account.⁸ A wife whose husband, a cripple, was knocked down and

¹ *English v. Beard*, 51 Ind. 489.

² *Aldrich v. Sager*, 9 Hun. 537.

³ *Wightman v. Devere*, 33 Wis. 570; *Hutchinson v. Hubbard*, 21 Neb. 33. See *Decker v. Stauning*, 57 How. Pr. 495. This is a new right of action. It is not necessary to sustain it that the injury alleged should be a common-law injury, or one before remediable

by action: *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337.

⁴ *Schneider v. Hosier*, 21 Ohio St. 99.

⁵ *Mulford v. Clewell*, 21 Ohio St. 191.

⁶ *Flynn v. Fogarty*, 106 Ill. 263.

⁷ *Mulford v. Clewell*, 21 Ohio St. 191.

⁸ *Wightman v. Devere*, 33 Wis. 570.

robbed while drunk was held entitled to sue.¹ It is an injury to a woman's means of support that her husband spent for drink money that she had trusted him with to buy a horse for her to use in business;² and that a son, while drunk, overdrove and so killed a horse belonging to his mother.³ Indeed, the simple spending of one's money on liquor is a sufficient injury to the wife's means of support to sustain an action by her.⁴

It is not essential that the wife shall have been without support in whole or in part. Means of support relate to the future as well as to the present. It is sufficient if the sources of her future maintenance have been stopped or diminished below what is reasonable for one in her station of life.⁵ But nevertheless, as said in an Illinois case, the law was not intended as a means of speculation, but as a protection against injury to the wife and children of the drunkard, to preserve the property used by the family from destruction or injury, and to protect the family against immediate or probable want of adequate support; not to enable the affluent, or those well provided for, to sue and recover simply because the husband and father may become intoxicated, and, whilst in that condition, loses time, neglects his business, or becomes injured, or earns less money, or even loses it, by neglect of busi-

¹ *Franklin v. Schermerhorn*, 8 Hun, 112.

² *McEvoy v. Humphrey*, 77 Ill. 388.

³ *Bertholf v. O'Reilly*, 8 Hun, 16.

⁴ *Quain v. Russell*, 8 Hun, 319.

⁵ *Mulford v. Clewell*, 21 Ohio St. 191; *Woolheather v. Risley*, 38 Iowa, 189; *Hackett v. Smelsley*, 77 Ill. 109, the court saying: "From the earliest period of the law, there has been a legal obligation on the husband to support his wife. No act of the legislature of this state, when this alleged cause of action accrued, had ever abrogated such law. It has never been annulled by judicial construction, nor do we recognize in courts the right so to annul it. . . . The right of support is not lim-

ited to the supplying of the bare necessities of life, but embraces comforts, what is suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied, and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of support of her own. There are always independent means of support. No one is absolutely dependent on another for means of support; for where there is the absence of other means of support, it is provided by public authority." But see *contra*, *Hayes v. Phelan*, 4 Hun, 738.

ness, and hence is not possessed of as large means as he otherwise would have been.¹ A widow dependent on her son for her support may maintain an action against a liquor-seller who, by his sales to her son, has deprived her of her means of support.² In order that a father may recover for damages sustained from a sale of liquors to his son, he must show his poverty and dependence on the son.³ There can be no recovery without proof that the services of the son were necessary to the father's support, or that the expenses of his illness had so diminished his means as to render them inadequate for his support.⁴ A statute which makes a person unlawfully furnishing spirituous liquors responsible for injuries resulting therefrom, and gives a remedy to any person on whom such injured person may be dependent for means of support, does not give one upon whom a person becomes dependent in consequence of intoxication produced by liquor so furnished, and who was not previously dependent upon him, any right of action.⁵ An action will lie at the suit of a wife or child against the seller of liquors to one who while so intoxicated, and in consequence of such intoxication, receives injuries resulting in death.⁶

In New York, it was held in a case where several persons became intoxicated and engaged in an affray in which one of them was killed, that his widow could maintain an action against the persons who sold the liquor which caused intoxication, to recover the damages sustained by her from the death of her husband.⁷ If the marriage was

¹ *Confrey v. Stark*, 73 Ill. 187.

² *McClay v. Worrall*, 18 Neb. 44.

³ *Stevens v. Cheney*, 36 Hun, 1.

⁴ *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337; *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323.

⁵ *Hollis v. Davis*, 56 N. H. 74.

⁶ *Lawson on Civil Remedies*, 36; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Roose v. Perkins*, 9 Neb. 304; 31 Am. Rep. 409; *Schroeder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236; *Rafferty v. Buckman*, 46 Iowa, 195.

Contra, *Hayes v. Phelan*, 4 Hun, 743; *Barrett v. Dolan*, 130 Mass. 366; 39 Am. Rep. 456; *Kirchner v. Myers*, 35 Ohio St. 85; 35 Am. Rep. 598; *Davis v. Justice*, 31 Ohio St. 359; 27 Am. Rep. 514.

⁷ *Jackson v. Brookins*, 5 Hun, 533, the court saying: "It is true the statute does not in express terms give the right of action upon the cause of death. It does not define the injuries meant to be covered, or enumerate them. It says generally, 'injuries to person,

illegal or void, the alleged wife cannot recover for injuries to her means of support; but she may sue if she has been injured in person or property.¹ On the question of whether a woman is injured in her "means of support" by reason of defendant's sales of liquor to her husband, it may be shown that she has since married again.² So evidence that she was supported by herself and by the county is material.³ So evidence of the health and habits of the deceased is admissible as showing the amount of support furnished by him.⁴ The period for which damages are to be computed is the time during which the husband could furnish no or only partial support by reason of the intoxication.⁵ If liquors are sold to one previously intemperate, and not supporting his wife, the wife suing is not entitled to recover as for the loss of the sober, intelli-

property, or means of support in consequence of the intoxication of any person.' If death ensues as the natural and legitimate result of the intoxication, it is covered by the language of the statute. All injuries are covered that are consequent upon the intoxication. If death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded. The statute should not be so construed. It admits of the other construction, and that is more consonant with its benign purposes. Its main object was to provide a remedy for cases before remedies. Had it been confined to injuries to person and property, it might have been said with some force that only those injuries were meant to be covered for which there was before then a remedy against the intoxicated person: *Hayes v. Phelan*, 4 Hun, 733. But when it provided for injuries to means of support, it made actionable a new class of injuries without remedy at the common law, and unprovided for by any previous statute. The wrong consisted in the fact that the sellers of liquors shut their eyes to the condition, in person or family, of those to whom they sold. They dealt out an article which, under certain circum-

stances often liable to exist and to be known to the seller, would, without fail, produce injury, and perhaps death. Carelessness and neglect, morally criminal, were shielded under the license law. For this wrong, the statute under consideration provided a remedy. Notice the class of persons especially endowed with a right of action, — husband, wife, child, parent, guardian. When the statute provided that any of them might have a right of action for any injury to his or her means of support, in consequence of the intoxication of any one, is it reasonable that the legislature only meant to provide for such causes of action as before then already existed against the intoxicated person? It seems to me not; but that the main object was to provide a remedy for an evil entirely without remedy before. The law does not provide how the injury to the means of support must be produced in order to be actionable, when it is in consequence of intoxication. It is therefore without limit in that respect."

¹ *Kearney v. Fitzgerald*, 43 Iowa, 580.

² *Sharpley v. Brown*, 43 Hun, 374.

³ *Fox v. Wunderlich*, 64 Iowa, 187.

⁴ *Kerkow v. Bauer*, 15 Neb. 150.

⁵ *Warrick v. Rounds*, 17 Neb. 411.

gent society of the husband, and of means of support; the liability must be measured by the effects produced upon the husband and wife as they were, and not as they might have been.¹

In Wisconsin, in a case where a husband, in consequence of becoming intoxicated by liquor sold to him by the defendant, received certain injuries, it was held that the wife was entitled to recover,—1. Compensation for watching, nursing, and taking care of him during his sickness; 2. Damages for injury to her own health in consequence; 3. The expenses of employing medical attendance and assistance; 4. The cost of hiring labor to attend to his business.² And in Illinois, where the husband of the plaintiff had become a confirmed drunkard, abandoning an occupation in which he was earning five dollars a day, and had squandered a valuable property, a verdict of ten thousand dollars actual and two thousand dollars exemplary damages was considered not excessive.³

ILLUSTRATIONS.—The defendant sold liquor to plaintiff's husband, by which the latter became intoxicated, and while in that state received certain injuries; and plaintiff watched, nursed, and took care of him for a certain number of days, while suffering from these injuries; injured her own health by this watching, so as to require medical treatment; employed two men at certain times to assist her in such care; employed a physician to attend him, and paid the bill; and had to hire a man to do work upon her farm, which her husband would have done if not thus disabled. *Held*, that the wife could recover damages against defendant on all the above grounds: *Wightman v. Devere*, 33 Wis. 570. A complaint alleged that the defendant sold liquor to her husband, causing him to become intoxicated, and incompetent to care for himself; and that while so intoxicated he remained away from home a number of days, obliging her to do his work, in which time he spent a large sum of money needed for the support of plaintiff and family. *Held*, to set forth a good cause of action: *Hill v. Berry*, 75 N. Y. 229. It appeared that the husband's labor afforded the family their only support, and that he had neglected to labor, owing to habits of intoxication, and that plaintiff had become an object of public

¹ Ganssly v. Perkins, 30 Mich. 492.

³ Jewett v. Wanshura. 8 Chic. L. N.

² Wightman v. Devere, 33 Wis. 570. 324.

charity. *Held*, that an instruction that plaintiff was entitled to recover for any actual damage to her means of support caused in whole or in part by liquor sold to her husband by defendant, causing his intoxication, was based upon sufficient evidence: *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625. The husband of plaintiff was a cripple, and able to earn but little towards the support of his family, which consisted of plaintiff and four children. He received a quarterly pension of fifty-four dollars, and, on the day he received it, got intoxicated in part at defendant's house, and thereby lost or had stolen from him fifty dollars. *Held*, that plaintiff, as wife, could recover only her proportionate share, or one fifth thereof, and that it was error on the part of the judge below to refuse so to charge: *Franklin v. Schermerhorn*, 8 Hun, 112.

§ 1136. **Exemplary Damages.**—Exemplary damages may be recovered under the statutes.¹ But they cannot be given without proof of actual damages.² Exemplary damages may be given though the defendant is liable also to the criminal law.³ Where actual damages are proved, exemplary damages, it is held in some cases, may be awarded without proof of aggravating circumstances.⁴ But in others, it is required that the plaintiff shall show, not only some damage suffered, but also some aggravating circumstances on the part of the seller accompanying the transaction.⁵ It will go in aggravation of damages, and

¹ *Kehrig v. Peters*, 41 Mich. 475. The surety on a liquor-dealer's bond conditioned to pay "any damage any person may sustain, or which may result from the drinking of any wine or beer, or any liquor got or procured" on the premises, is liable for exemplary as well as compensatory damages to any amount not exceeding the bond: *Richmond v. Shickler*, 57 Iowa, 486. *Contra*, *Cobb v. People*, 84 Ill. 511.

² *Calloway v. Laydon*, 47 Iowa, 456; 29 Am. Rep. 489; *Ganssly v. Perkins*, 30 Mich. 495; *Wightman v. Devere*, 33 Wis. 570; *Keedy v. Howe*, 72 Ill. 133; *Gilmore v. Mathews*, 67 Me. 517.

³ *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625; *Brannon v. Silvernail*, 81 Ill. 434. *Contra*, *Koerner v. Oberly*, 56 Ind. 284; 26 Am. Rep. 34; *Schafer v. Smith*, 63 Ind. 226.

⁴ *Hackett v. Smelsey*, 77 Ill. 109; *Schneider v. Hosier*, 21 Ohio St. 98; *Durvy v. Blum*, 11 Ohio St. 332; *Goodenough v. McGrew*, 44 Iowa, 670.

⁵ *Franklin v. Schermerhorn*, 8 Hun, 112; *Ganssly v. Perkins*, 30 Mich. 492; *Kellerman v. Arnold*, 71 Ill. 632; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Albrecht v. Walker*, 73 Ill. 69; *Brantigan v. White*, 73 Ill. 561; *Confrey v. Stark*, 73 Ill. 187; *Graham v. Fulford*, 73 Ill. 596; *McEvoy v. Humphrey*, 77 Ill. 388; *Rawlins v. Vidvard*, 34 Hun, 205; *Fox v. Wunderlich*, 64 Iowa, 187. They are recoverable only when the act of selling was willful, wanton, or so reckless as to deserve punishment: *Kadgin v. Miller*, 13 Ill. App. 474. They cannot be imposed if it does not appear that any request or suggestion had been made to the defendant to

to support the awarding of exemplary damages, that the seller had been notified not to sell to the drunkard;¹ or that he knew him to be in the habit of getting intoxicated;² or that he sold the liquor in violation of law.³ So on this point evidence of mental suffering on the part of the wife or other relative is relevant.⁴ So is evidence of sales made by the defendant to the husband after the commencement of the wife's action for damages.⁵ So the wife may show the number and ages of her children, if she also shows that the defendant, prior to selling the liquor to her husband, had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home.⁶

§ 1137. **Remote Damages.**—The sale of the liquor must be the natural and immediate cause of the death.⁷ Thus where a husband became grossly intoxicated from liquor sold to him by defendant, and while being taken home in his wagon in this state received injuries from a barrel of salt falling upon him, from which injuries he died, it was held that his widow had no right of action under the statute, the death of the husband being the immediate, and the intoxication of the husband only the remote, cause of the injury to her.⁸ So where the husband

refuse liquor to the injured person, or that he knew that the latter had any family: *Steele v. Thompson*, 42 Mich. 594.

¹ *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625; *McEvoy v. Humphrey*, 77 Ill. 388; *Kellerman v. Arnold*, 71 Ill. 632; *Brantigan v. White*, 73 Ill. 561.

² *Wertz v. Ewen*, 50 Iowa, 34.

³ *Mason v. Shay*, 7 Chic. L. N. 152; *Schafer v. Smith*, 4 Cent. L. J. 271; *Neu v. McKechnie*, 95 N. Y. 632; 47 Am. Rep. 89; *Davis v. Standish*, 26 Hun, 608. *Contra*, *Struble v. Nodwith*, 11 Ind. 65.

⁴ *Lawson on Civil Remedies*, 39.

⁵ *Bean v. Green*, 33 Ohio St. 444.

⁶ *Ward v. Thompson*, 43 Iowa, 538.

⁷ *Hart v. Duddleson*, 20 Ill. App. 618.

⁸ *Krach v. Heilman*, 53 Ind. 517, the court saying: "The defendants, in causing the intoxication of the deceased, could not have anticipated that, on his way home, he would be fatally injured by the salt-barrel. That was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him, could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation the intoxication may have been the remote cause

on becoming intoxicated wandered onto a railroad track and was killed, it was held that the injury was too remote.¹ If the death of a party who receives a wound while intoxicated can be traced as the natural and probable result of any new or intervening cause, such as reckless exposure of himself, or amputation of the wounded limb when amputation was not necessary, the liquor-seller will not be responsible to the wife for the death.² A wife cannot maintain an action for damages received by her by falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor.³ A death resulting from an assault committed upon the husband for abusive language used by him while intoxicated is too remote.⁴ But an action lies for direct injuries done by the intoxicated person, as well as for damage arising from the intoxication. Thus an action lies against the liquor-seller for direct damage done by the drunken person, as where one was wounded by the discharge of a pistol flourished by a drunken man on a freight train.⁵ A suicide may be deemed attributable to a sale of intoxicating liquors.⁶

ILLUSTRATIONS. — An intoxicated person going home at night had to cross a railroad. Next morning he was found on the track, killed by being run over by the cars. *Held*, that the intoxication was the proximate cause of his death: *Schroeder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236. The father of the minor plaintiff, while intoxicated by liquor sold him by the defendant, murdered the plaintiff's mother and committed suicide. The plaintiff was dependent on his father for support. *Held*,

of his death, because if he had not been intoxicated he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed, it may be assumed as clear that the parties causing the intoxication would not be liable under the statute to the widow as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here."

¹ *Collier v. Early*, 54 Ind. 559. *Contra*, *Schroeder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236.

² *Schmidt v. Mitchell*, 84 Ill. 195; 25 Am. Rep. 446.

³ *Johnson v. Drummond*, 16 Ill. App. 641.

⁴ *Shugart v. Egan*, 83 Ill. 56; 25 Am. Rep. 359.

⁵ *King v. Haley*, 86 Ill. 106; 29 Am. Rep. 14.

⁶ *Blatz v. Rohrback*, 42 Hun, 402.

that the defendant was liable: *Neu v. McKechnie*, 95 N. Y. 632; 47 Am. Rep. 89. A boy of eighteen got drunk in company with the defendants, who paid for some of the liquor, while the boy paid for the rest. While drunk the boy assaulted the plaintiff of his own volition. *Held*, that an action against the defendants on the ground that their conduct in furnishing the liquor caused the assault could not be maintained: *Swinfin v. Lowry*, 37 Minn. 345. A liquor-seller sold to a man who got drunk and committed a murder, for which he was sent to prison for life. *Held*, that the murderer's wife could recover against the liquor-seller: *Beers v. Walhizer*, 43 Hun, 254. The action was for the death of a person who having been drinking, lost his way, drove into the water, and was drowned. *Held*, that if he lost his way because of the intoxication, but afterwards became sober, and in an effort to regain the road drove over the bank to his death, the drowning was caused by the intoxication: *Kerkow v. Bauer*, 15 Neb. 150. Action against S. for furnishing liquor to D. It appeared that D., on returning from a fishing excursion, drank at S.'s bar at least ten times between four and six o'clock in the afternoon, and then started down the lake with W. in a small boat, which was capsized, and D. was drowned; that W., though not so good a swimmer as D., reached the shore alive. S. claimed that he sold the liquor under an arrangement with D. that D. should go home in S.'s stage, but that W. induced D. to attempt to go to W.'s house. *Held*, that the jury were not confined to an inquiry as to whether intoxicating liquor was the immediate cause of the death; that if it was the proximate cause, they were justified in rendering a verdict for the plaintiff: *Davis v. Standish*, 26 Hun, 608. A's bar-tender sells liquor to B, and, an altercation arising, the bar-tender throws a glass at B, which misses him, and injures C. *Held*, that the injury is not the proximate consequence of A's act in selling the liquor: *Lueken v. People*, 3 Ill. App. 375.

§ 1138. **Mitigation of Damages — Evidence.** — The defendant may show in mitigation of damages that he was lawfully licensed to sell liquors at the time of the sale in question;¹ that he had instructed his servant not to sell to the person, but his orders had been disobeyed;² that he had refused to sell, but the party had procured the liquor by a trick;³ that the alleged buyer in the period became

¹ Lawson on Civil Remedies, 42. *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Contra*, *Roth v. Eppy*, 80 Ill. 283. *Meadows*, 72 Ill. 540.

² *Brantigan v. White*, 73 Ill. 561;

³ *Bates v. Davis*, 76 Ill. 223.

intoxicated by liquors which he bought of other persons.¹ But to render evidence of recoveries from other parties admissible to reduce damages, it must be shown that such other recoveries were for sales during the same time as that covered by the alleged sales by defendant.²

§ 1139. **Evidence—In General.**—Evidence is admissible to show the fact of the party's intoxication before it is shown that such intoxication was caused by the defendant.³ So evidence is admissible of the practice of the drunkard in visiting other saloons;⁴ or of his inability to obtain employment on account of his habit.⁵ The wife may show that her husband supported her, and that she had no other means of support.⁶ In an action for injuries to a wife arising from the sale of liquor to her husband, there should, as a rule, be no evidence allowed of facts antecedent to the unlawful acts complained of, except to show his habits and circumstances before they were committed; but the jury should be told to discriminate between losses caused by commercial changes and those which result from drunken neglect. The evidence of his pecuniary condition before the acts complained of is not to be introduced as showing a substantive cause of action, but to be considered with other facts as showing the damage sustained by plaintiff.⁷ Evidence as to the number, age, and sex of her children is not admissible to affect the question of damages.⁸ Evidence of the value of the estate of the husband before the liquor law took effect, and the reduced condition of his pecuniary affairs at the time of the trial, is inadmissible.⁹ A judgment obtained by her in an action against another party for injury thereto accruing at the same period is admissible to show

¹ *Kirchner v. Myers*, 35 Ohio St. 85; 35 Am. Dec. 578.

² *Jackson v. Noble*, 54 Iowa, 641.

³ *Woolheather v. Risley*, 38 Iowa, 486.

⁴ *Hemmens v. Bentley*, 32 Mich. 89.

⁵ *Roth v. Eppy*, 80 Ill. 283.

⁶ *Mayers v. Smith*, 121 Ill. 442.

⁷ *Friend v. Dunks*, 37 Mich. 25;

Dunlavey v. Watson, 38 Iowa, 398.

⁸ *Huggins v. Kavanagh*, 52 Iowa, 368.

⁹ *McCann v. Roach*, 81 Ill. 213.

the actual extent of the wrong done by the defendant.¹ But evidence is inadmissible of sales made prior to the passage of the statute giving the remedy,² or subsequent to the bringing of the action.³ The evidence must be confined to the cause stated in the declaration or petition; and where the injury alleged is to means of support, it is error to admit proof of injury to property.⁴

Under those acts which give a remedy in case only of sales or gifts made in violation of their provisions, the proof is required to be more direct, such an action being in its nature *quasi* criminal. Where the action is brought for damages caused by the sale of liquors to an habitual drunkard, it must be shown that the defendant knew him to be such,⁵ although it need not be proved that he was intoxicated at the time the liquor was furnished.⁶ But knowledge of the intemperate habits of the person may be proved by reputation.⁷ And in the case of a sale to a minor, the burden of proof is upon the defendant to show that he believed him to be of full age.⁸ And it has been held that a sale to a minor who asks for the liquor in behalf of one to whom it might lawfully be sold is in contravention of the statute.⁹ The furnishing of liquors to a minor, as prohibited in the statute, is complete, although the liquor may have been purchased by another, and supplied by the seller in pursuance of such purchase.¹⁰ And the statement of a physician who was in the habit of getting intoxicated, made at the time of his purchases of liquor, that he wanted it for a patient, and for medical purposes, does not, it has been held, in the absence of proof to the contrary, raise the presumption that the sales were

¹ Engleken v. Webber, 47 Iowa, 558.

² Dubois v. Miller, 5 Hun, 332.

³ Woolheather v. Risley, 38 Iowa, 486.

⁴ Hackett v. Smelsley, 77 Ill. 109.

⁵ Markert v. Hoffner, 4 Am. Law Rec. 111.

⁶ Fountain v. Draper, 49 Ind. 441.

⁷ Elam v. State, 24 Ala. 77; Wickwire v. State, 19 Conn. 477; State v. Kalb, 14 Ind. 404.

⁸ Farbach v. State, 24 Ind. 77; Rine-man v. State, 24 Ind. 80; Goetz v. State, 41 Ind. 162.

⁹ State v. Fairfield, 37 Me. 517.

¹⁰ State v. Munson, 25 Ohio St. 381.

made to the patient.¹ The sales of liquor need not be proved, as in a criminal case, beyond a reasonable doubt.² The jury must be satisfied by a preponderance of evidence that defendant contributed to the intoxication of the plaintiff's husband in an appreciable degree.³ But proof that the husband bought liquor of defendant will not shift the burden upon the latter to show that his liquor did not cause the former's drunkenness.⁴ A wife cannot recover upon proof merely that defendant was a liquor-seller, that her husband had been in his store, and had been seen coming therefrom intoxicated.⁵

§ 1140. **Law and Fact.**—What constitutes intoxication is a question of fact, to be determined by the jury upon the whole evidence, in the light of their own observation.⁶ It is improper for the court to charge as a matter of law that the selling of intoxicating liquors to a person far gone in habits of intoxication, and who had become diseased, bodily and mentally, would be more aggravating than selling to one not so badly addicted to intemperance, or who had more vigor of body or mind. Such questions are for the jury.⁷ Where a wife sues for an injury to her means of support by the sale of intoxicating liquors to her husband, the question of what circumstances will warrant exemplary damages is for the jury.⁸

§ 1141. **Pleading.**—Though the petition may allege that the intoxication was caused in whole by the defendant, a recovery may be had where the proof shows that it was caused in part only by him.⁹ But a complaint on the bond, under the Indiana statute, which averred that the intoxication was caused in part by liquors sold by the

¹ *Boyd v. Watt*, 27 Ohio St. 259.

² *Lyon v. Fleahmann*, 34 Ohio St. 151.

³ *Chase v. Kenniston*, 76 Me. 209.

⁴ *Macleod v. Geyer*, 53 Iowa, 615.

⁵ *Lovelan v. Briggs*, 32 Hun, 477.

⁶ *Roth v. Eppy*, 80 Ill. 283.

⁷ *Ludwig v. Sager*, 84 Ill. 99.

⁸ *Goodenough v. McGrew*, 44 Iowa, 670; *Schimmelfenig v. Donovan*, 13 Ill. App. 47.

⁹ *Roth v. Eppy*, 80 Ill. 283.

defendant's principal, and that while so intoxicated, and by reason of such intoxication, the purchaser caused damage, has been held bad.¹ Under the New Hampshire statute, a declaration in trespass alleging an assault and battery as having been committed directly by the defendant is sufficient where the plaintiff seeks to recover damages for an assault upon him committed by a person while in a state of intoxication caused by liquors unlawfully furnished him by defendant.² In Indiana, it is held that the complaint must distinctly aver that the injury complained of, and the damages sought to be recovered, resulted in consequence of a sale of intoxicating liquors; and therefore an averment that whilst A was intoxicated by reason of liquor sold him by C, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the wound was inflicted by reason of the intoxication of A.³ But a complaint by a wife, alleging that her husband became intoxicated by liquor purchased from the defendant, and thereby neglected his work, squandered his money, and damaged the plaintiff in her means of support, is good.⁴ A wife's complaint for causing her husband's intoxication need not aver the kind of intoxicating liquor sold, nor that the defendant had no license, nor that such liquor was sold on his premises, nor that the husband was intoxicated, or in the habit of becoming so, at the time of such sale.⁵ But a complaint which merely avers that defendant sold or gave, or permitted to be sold or given, to a third person named, a quantity of intoxicating liquor, which such person then and there drank, and by drinking which he became intoxicated, does not sufficiently show that the defendant caused the intoxication to render him liable. Under such averment, it may be that the liquor was given by some other person than defendant.⁶ A com-

¹ *Schafer v. Cox*, 49 Ind. 460.² *Bodge v. Hughes*, 53 N. H. 615.³ *Schafer v. Cox*, 49 Ind. 460.⁴ *Barnaby v. Wood*, 50 Ind. 405.⁵ *Walser v. Kerrigan*, 56 Ind. 301.⁶ *Ditton v. Morgan*, 56 Ind. 60.

plaint which avers that defendant kept a liquor-shop, that plaintiff's husband became intoxicated while defendant was in possession thereof, and that the intoxication was caused by liquor there given away or sold by defendant, charges a sale or giving away by defendant to plaintiff's husband with reasonable certainty.¹ An amendment to a declaration is allowable which alleges that the plaintiff's husband, while drunk, beat her, the original declaration having averred that, by reason of defendant's sales, her husband became intoxicated, unable to attend to business, failed to support her, and that she was otherwise injured. The amendment introduces no new cause of action.² Case is the proper form of action for recovering damages under the Michigan civil damage law, while *assumpsit* is the proper form for recovering back money paid for liquor; and these two demands cannot be joined in one count.³

§ 1142. **Defenses.**—That the person suing contributed to the injury sued for is a good defense. The wife cannot recover damages from the seller of intoxicating liquors for injuries committed by her husband upon herself while he was intoxicated, if she has contributed to his intoxication by purchasing the liquors, or uniting with him in drinking them.⁴ The fact that the wife has upon other occasions authorized the sale of liquors to her husband will not prevent her recovery of damages for a particular sale, if she did not assent to that. And her giving him money to procure liquor does not show that she contributed to his intoxication, in the absence of proof that he obtained the liquor by means of such money.⁵ So it is not proof of contributory negligence to show that she was in the habit of letting him

¹ Ford v. Ames, 36 Hun, 571.

² Chase v. Kenniston, 76 Me. 209.

³ Friend v. Dunks, 37 Mich. 25.

⁴ Engleken v. Hilger, 43 Iowa, 563; 195.

Elliott v. Berry, 34 Hun, 129; Rosecrants v. Shoemaker, 60 Mich. 4.

⁵ Rafferty v. Buckman, 46 Iowa,

have portions of his wages previously deposited with her, having reason to believe he would spend them for such drink.¹ And the purchase by her of liquor for the use of her husband at home, in order to prevent him from squandering time and money at saloons, or under his compulsion, is not such a complicity on her part as to bar her recovery for such injuries.² The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his home, and drank the same at home with the wife's knowledge and approval, and that all of such drinking on the part of her husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages. But such facts do not constitute a bar to the action,³ and the wife may prove that her husband compelled her to attend such places, and may be permitted to show the whole circumstances of the case as explanatory of her conduct. Where the plaintiff's husband was an habitual drunkard, and she had forbidden the sale of liquors to him by the defendant, but a day or two after such notice she went to the defendant's saloon in company with her husband, and in his presence directed the defendant to sell him all the liquor he asked for, it was held that the only reasonable inference from such conduct was, that the plaintiff acted under the coercion of her husband, and that the jury had a right to find that the defendant drew this inference, and therefore knew that she was not acting voluntarily.⁴ A wife's right of recovery is not affected by the fact that she had signed the defendant's petition for a dram-shop license.⁵ The plaintiff's allowing his son to

¹ *Huff v. Aultman*, 69 Iowa, 71; 58 Am. Rep. 213.

² *Kearney v. Fitzgerald*, 43 Iowa, 580; *Ward v. Thompson*, 48 Iowa, 588.

³ *Hackett v. Smelsley*, 77 Ill. 109.

⁴ *Jewett v. Wanshura*, 43 Iowa, 574.

⁵ *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

take his horse to drive to a neighbor's, though knowing the son to be of intemperate habits, is not such contributory negligence as to defeat his right of action for the value of his horse, where the son had gone to a saloon, and procured liquor, and, while under its influence, driven the horse so violently that he died.¹

ILLUSTRATIONS.—The plaintiff, an innkeeper, unlawfully sold the defendant intoxicating liquor, by reason whereof he became intoxicated, and behaved in a disorderly manner, and assaulted the plaintiff in the inn. *Held*, that he was not entitled to recover: *Aldrich v. Harvey*, 50 Vt. 162; 28 Am. Rep. 501.

¹ *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323.

TITLE XIV.

NEGLIGENCE.

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NEGLIGENCE.

CHAPTER LVIII.

DANGEROUS AGENCIES.

- § 1143. Keeping or shipping dangerous or noxious articles or property.
- § 1144. Vending, letting, or lending dangerous articles.
- § 1145. Use of fire-arms.
- § 1146. Explosion of steam-boilers.
- § 1147. Blasting rocks.
- § 1148. Contagious diseases — Unwholesome food.

§ 1143. **Keeping or Shipping Dangerous or Noxious Articles or Property.**—The keeping of gunpowder, nitroglycerine, or other explosive substances in large quantities in the vicinity of one's dwelling-house or place of business is a nuisance, and may be abated as such by action at law, or by injunction from a court of equity,¹ and if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence.² But in order to render such keeping of explosives a nuisance, negligence or improvidence in keeping, or the keeping of large quantities, must be alleged and proved. The mere fact that gunpowder and other explosives in reasonable quantities are kept in a public place is not sufficient evidence of a nuisance.³ If the evidence shows that it is improperly kept

¹ *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Wier's Appeal*, 74 Pa. St. 230; *Cuff v. R. R. Co.*, 35 N. J. L. 574; 10 Am. Rep. 205; *Reg. v. Lister*, 3 Jur. 570; *Crowder v. Tinkler*, 19 Ves 617.

² *Myers v. Malcolm*, 6 Hill, 157; 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654.

³ *People v. Sands*, 1 Johns. 78; 3 Am. Dec. 296.

in an exposed situation, where the liability to explosion and consequent danger is great, the fact of nuisance is established, and the owner or keeper, or both, are liable not only to indictment, but also for all damages that result therefrom.¹ In determining the question, the locality, the quantity, and the manner of keeping will all be considered, as well, also, as the nature of the explosive and its liability to accidental explosion.² A railroad company storing explosives in a depot-building having a defective chimney flue, by reason whereof the building takes fire, and there is an explosion injuring the plaintiff's neighboring property, is liable for the injury.³

A person is liable for injuries caused by the escape of noxious gases or liquids, where the escape is through his neglect or want of care.⁴ A lessee may maintain an action against one who has laid gas-pipes in neighboring streets so imperfectly that gas escapes therefrom through the ground and into the water of a well upon premises hired and used by him for a livery-stable, and thereby renders it unfit for use, and makes the enjoyment of his estate less beneficial, although the nuisance may have existed in a less degree when the premises were hired; and may recover for the inconvenience to which he has been thereby subjected, and expenses incurred in reasonable and proper attempts to exclude the gas from the well, but not for injury caused by allowing his horses to drink the water after he knew that it was corrupted by the gas.⁵

One who knowingly plants on his land a noxious tree whose limbs project over an adjoining land in which cattle are pastured is liable for an injury to the cattle caused by

¹ *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744.

² *Wood on Nuisances*, 153.

³ *Denver, South Park etc. R. R. Co. v. Conway*, 8 Col. 1; 54 Am. Rep. 537.

⁴ *Thompson on Negligence*, 107. See also *Gas Companies*, *ante*, Title II., Corporations; and *Nuisance*, *post*, Div. III.

⁵ *Sherman v. Fall River Iron Works*, 2 Allen, 524; 79 Am. Dec. 799. But he cannot recover for injury to his business if it is illegal, as where it is carried on without a license: *Sherman v. Fall River*, 5 Allen, 213. And see *post*, Division III., Water and Watercourses.

their eating the poisonous leaves.¹ But new inventions in machinery are not prohibited from being shown in proper places, in proper condition, and at proper times, because either men or animals may become frightened at the unusual sight.²

One who ships dangerous goods by a carrier without informing him of their nature is liable in damages for any injury which they may cause.³ The shipper knowing the dangerous character of the goods is bound to notify the carrier; but if he is ignorant of their dangerous character, and is guilty of no negligence, he will not be liable.⁴ The carrier to whom dangerous goods are delivered without notice is not responsible for damages which may be caused by them while in his hands without negligence on his part. In a leading case in the United States supreme court, express-carriers received and transported from New York to San Francisco a package of nitro-glycerine, a substance then little known, in ignorance of the name and character of its contents, and without negligence. The package having leaked on the voyage, when it was received at the carriers' warehouse in San Francisco, an agent and a servant of theirs, together with a representative of the steamship company which had transported it for them, proceeded in the usual manner, and in ignorance of the character of its contents, to open it for the purpose of ascertaining the cause of the leakage. While they were doing this, it exploded, killing all persons present, destroying the building in which it was, and greatly damaging other buildings. It was held that the carriers were not liable to pay damages for the property thus destroyed, except as to that occupied by them

¹ *Crowhurst v. Amersham Burial Board*, 4 L. R. 4 Ex. Div. 5.

² *Huntoon v. Trumbull*, 2 McCrary, 314.

³ *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 67; *Barney v. Burns-*

stenbinder, 7 Lans. 210; 64 Barb. 212; *Farrant v. Barnes*, 11 Com. B., N. S., 553; *Boston etc. R. R. Co. v. Shanly*, 107 Mass. 568.

⁴ *Brass v. Maitland*, 6 El. & B. 470.

as tenants under a lease, as to which they admitted a liability as for a waste.¹

ILLUSTRATIONS. — The owner of a farm leased small parcels in the middle of it to laboring men. A farm road approached the holdings, but did not reach them. Toward the leased parcels from the end of the road the lessor stored a box of dynamite, with cartridge-exploders, under a low shed made against a stump, and only partially inclosed, and in a rough-bound box not always kept covered, and never securely fastened. A child of one of the lessees who had been at work in the field went into the shed, broke one of the cartridges from the box, and striking it with a stone, exploded it, and was injured. Neither he nor his father knew what was kept in the shed, or knew of any danger there, or of any reason for keeping away from it; and there was no warning on or about the shed, except the word "powder" written on the box, which neither of them, if they had seen it, could have read. *Held*, that the lessor was responsible: *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154. For the purposes of fumigation under the direction of the health-officer, the steward of a vessel (as was his duty) cleared the passengers from the steerage. He furnished the health-officers with the drinking-cups of the passengers in which to put the fumigating compound, a poisonous substance. After the fumigation, he ordered the passengers back to the steerage without having removed the drinking utensils, or seeing that they were thoroughly cleaned, although he knew the character of the fumigating substance. A mother (a passenger) allowed one of her children, of five years of age, to play about the steerage, in her presence. She did not know that any deleterious substance was contained in the drinking-cups. The child drank of the mixture in one of them, and died from the effects of the poison. *Held*, 1. That the steward was guilty of negligence; 2. That the mother was not guilty of contributory negligence, although she had seen the child take the cup to drink out of it: *Ryall v. Kennedy*, 40 N. Y. Sup. Ct. 347. A, traveling without right along a railroad track, picked up a torpedo which had been placed there as a danger signal. While handling the torpedo, it exploded and killed him. *Held*, that the company was not responsible: *Carter v. R. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754. A laborer in trespassing upon A's premises found three jars of water, and one jar full of a colorless liquid poison, resembling water, but labeled "poison," and by mistake drank of the poison, and died. *Held*, that A was not liable: *Callahan v.*

¹ The Nitro-glycerine Case, Parrott Baney, 1 Saw. 423. And, see *Pierce v. Wells*, 15 Wall. 524; *Parrott v. Winsor*, 3 Cliff. 18; 2 Sprague, 35.

Warne, 40 Mo. 131. A contractor, for blasting, ordered one manufacturer to send him a quantity of dualin, and another to send him certain exploders. Each manufacturer, without the other's knowledge, delivered the respective articles to a carrier who was ignorant of the danger of combining the two substances, which, while being transported with due care, exploded, injuring the property of the carrier, and the goods of a third party. It was impossible to distinguish what proportion of the explosion was caused by either substance. *Held*, that the two manufacturers, but not the contractor, were jointly liable to the carrier and to the third party: *Boston and Albany R. R. Co. v. Shanly*, 107 Mass. 568. The defendant delivered to the servant of a railroad a carboy of nitric acid, to be transported to a distant place, without communicating to him its dangerous nature, which there was nothing in its appearance to indicate. Whilst it was being carried by the servant, the carboy, from some unexplained cause, burst, and its contents flowed over and severely injured him. *Held*, that the defendant was liable for the injury: *Farrant v. Barnes*, 11 Com. B., N. S., 553. The employees of a railroad placed some signal-torpedoes on the track near a depot and at a place used as a crossing. They intended to explode them, but went away without doing so. Immediately after the train had moved on, a boy of nine years, who, with the knowledge of the railroad employees, was coming on the track immediately behind the train, discovered the torpedo, picked it up, and exhibited it to the plaintiff, a boy ten years old, and several other boys of about the same age, all of whom were ignorant of its dangerous or explosive character. While it was being so exhibited near where found, it exploded, without plaintiff's fault, with such force that it killed one boy, destroyed an eye of each of two others, and tore off plaintiff's left hand and arm, and otherwise injured him. *Held*, that the railroad was liable for the injury: *Harriman v. R. R. Co.*, 45 Ohio St. 11.

§ 1144. **Vending, Letting, Lending, Dangerous Articles.**—If one sells or delivers an article which he knows to be dangerous or noxious to another person, without notice of its nature or qualities, he will be liable for any injury which may reasonably be contemplated as likely to result, and does result, to the person receiving it or a third person.¹ In a Massachusetts case the declaration alleged that the defendants, knowing one J. S. to be a retailer of

¹ *Wellington v. Downer etc. Oil Co.*, 104 Mass. 64.

fluids to be burned in lamps for illuminating purposes, and knowing naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that, in ignorance of its dangerous properties, J. S. retailed a pint of it to the plaintiff, to be burned in his lamp for illumination; and that while the plaintiff, in like ignorance, was so burning it, it exploded and injured him and his property. It was held that this disclosed a good cause of action. "The defendants," said the court, "were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous for the purpose of being resold in the market without giving information of its nature, and were therefore bound to contemplate as a natural and probable consequence of their unlawful act that it might explode or ignite, and injure an innocent purchaser or his property, and to answer in damages for such a consequence, if it should come to pass."¹ A person selling gunpowder to an infant is liable for the damage which the infant may cause by it, even to itself.² But a vendor of an article of his own manufacture not in itself dangerous is not liable for injuries caused by a defect in it received by one who uses it with the consent of the purchaser; as, for example, the seller of a steam-boiler,³ or an emery-wheel.⁴ In England, it has been held that where a father purchased a gun to be used by himself and his sons, which the vendor warranted to be good and safe, and while in use by one of his sons it exploded in consequence of being defectively constructed, and the son was thereby injured, the latter was entitled to recover damages of the vendor.⁵ So where a

¹ *Wellington v. Oil Co.*, 104 Mass. 64.

² *Carter v. Towne*, 98 Mass. 567; 96 Am. Dec. 682. In slavery times, one selling liquor to a slave, from drinking which he dies, was held liable to the master for his value: *Harrison v. Berkeley*, 1 Strob. 525; 47 Am. Dec. 578.

³ *Loose v. Clute*, 51 N. Y. 494.

⁴ *Loop v. Litchfield*, 42 N. Y. 351; 1 Am. Rep. 543.

⁵ *Langridge v. Levy*, 2 Mees. & W. 519; 4 Mees. & W. 337. And see *Longmeid v. Holliday*, 6 Ex. 761.

person purchased of a chemist a bottle of hair-wash, to be used by his wife in dressing her hair, and she used it and thereby received injuries in consequence of its having been compounded of deleterious substances, the court of exchequer held that the purchaser and his wife were entitled to recover damages.¹ A woolen manufacturer who uses a dye which has never caused an injury, and which he has no reason to suppose will do so, is not liable to a purchaser poisoned by handling the cloth.²

ILLUSTRATIONS. — A had contracted with the postmaster-general to provide a mail-coach to convey the mail-bags along a certain line of road; B and others had agreed to horse the coach along the same line, and B and his co-contractors hired C to drive the coach. While C was driving the coach it broke down from latent defects in its construction, and C was injured. *Held*, that C could not recover damages of A, because there was no privity of contract between them: *Winterbottom v. Wright*, 10 Mees. & W. 109. A railway company furnished a crane, to be used by customers in unloading freight which they were bound to unload at their own expense. Owing to a defect in the crane, of which the company had knowledge, a person called in temporarily to assist a consignee in unloading freight was killed. *Held*, that his personal representative could not recover damages of the company: *Blakemore v. R. R. Co.*, 8 El. & B. 1035. A employed B and C to repair a ship, and hired the defendants' dry-dock for the purpose of making such repairs. B and C erected a scaffolding upon standards attached to the dock, which belonged to the defendants, and which, by the rules of the defendants, they were required to use for that purpose. Owing to the insufficiency of these standards, the scaffolding gave way, whereby D, a workman employed by B and C, in making such repairs, was injured. *Held*, that D could recover in an action against the owners of the dry-dock for this injury: *Cook v. New York Floating Dock Co.*, 1 Hilt. 436; 18 N. Y. 229. The defendant manufactured a steam-boiler and sold it. While it was in the possession and

¹ *George v. Skivington*, L.R. 5 Ex. 1, court saying: "Quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it

extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." And see further, on this subject, *ante*, Title Principal and Agent — Druggists.

² *Gould v. Slater Woolen Co.*, 147 Mass. 315.

control of the purchaser, it exploded, and plaintiff, a third party, was injured. *Held*, that A was not liable to plaintiff, even if the construction of the boiler was defective: *Losee v. Clute*, 51 N. Y. 494; 10 Am. Rep. 638. A sold hay upon which white lead paint had been spilt; but which he had attempted to cleanse. The purchaser's cow ate thereof and died. *Held*, that an action lay against A: *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440. Plaintiff charged that defendant had sold him a barrel of gasoline instead of a barrel of puroline ordered by him, and that the burning of his mill had resulted from the substitution. It appeared that the one was about as dangerous as the other, and that the barrel was marked "explosive and dangerous." *Held*, that the action could not be maintained: *Socola v. Chess-Carley Co.*, 39 La. Ann. 344.

§ 1145. **Use of Fire-arms.**—In the use of fire-arms, a high degree of care is required. The reasonable care which persons are bound to take, in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous is bound to use more than ordinary care. In the keeping and using of fire-arms, so great care is necessary to prevent injury to others that an action for damages caused by the keeping or use of guns and pistols is sustainable on proof of very slight negligence.¹ In a case which well illustrates this principle "the plaintiff rode his mare to the town of Warrensburg and hitched her near to a store, one of the usual places for hitching horses in that town. On the same day, the defendant

¹ *Underwood v. Hewsen*, 1 Strange, 596; *Weaver v. Ward*, Hob. 134; *Cole v. Fisher*, 11 Mass. 137; *Dalton v. Favour*, 3 N. H. 465; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Wright v. Clark*, 50 Vt. 130; 28 Am. Rep. 496; *Chiles v. Drake*, 2 Met. (Ky.) 146; 74 Am. Dec. 406; *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55; *Conklin v. Thompson*, 29 Barb. 218; *Morgan v. Cox*, 22 Mo. 373; 66 Am. Dec. 623, the court saying: "If a gamekeeper, returning home from his duty, were to leave his loaded gun in a play-

ground, and one of the boys should fire it off and injure another, it could not be doubted but that the gamekeeper must answer in damages to the injured party.' I recollect myself a case that occurred, where a person in riding through the streets of one of our villages with his loaded rifle before him, lying horizontally across his saddle, it accidentally fired and wounded a person sitting in his own door, and no doubt seemed to be entertained of the responsibility of the party for the damage that resulted."

happened to go to town, and took with him a loaded rifle-gun. On reaching town, he placed his gun in the store near to which the plaintiff's mare was hitched. In the evening, when about to leave for home, he got his gun, and in the act of placing it upon his arm or shoulder, from some cause not explained in the proof, the gun fired, and the contents passed through the body of plaintiff's mare, standing at the post where she had been hitched, and killed her. The defendant had been drinking, but was not intoxicated. The proof placed it beyond reasonable doubt that the discharge of the gun was accidental, and wholly unintentional on the part of the defendant. The question was, upon the state of facts, Was the defendant liable for the injury to the plaintiff? The court, affirming the judgment below, held that the defendant was liable.¹ Discharging a gun on or near a highway is such

¹ *Tally v. Ayres*, 3 Sneed, 677. The court say: "The argument for the plaintiff in error resolves itself into this: that in carrying his gun he was in the exercise of a lawful right, and that, as the discharge of the gun which caused the injury was entirely accidental and without the concurrence of his will, he cannot be held liable for the loss to the plaintiff. The argument is not tenable. In the general class of cases to which the present belongs, there is some contrariety of opinion in respect to the appropriate form of action, whether trespass or case, the criterion being whether the injury arose directly or followed consequentially from the act of the defendant. No such question is pretended in this case; nor can any such question arise in any case, in the present state of our law, the distinction being, in effect, abolished by a recent legislative enactment. But there is no conflict of opinion as respects the right of a party, in a civil action, to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, although such injury may have

been purely accidental and unintentional. To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant. The lawfulness of the act from which the injury resulted is no excuse for the negligence, unskillfulness, or reckless incaution of the party. Every one, in the exercise of a lawful right, is bound to use such reasonable vigilance and precaution as that no injury may be done to others. Nor is it material, in a civil action for the recovery of damages, whether the injury was willful or not. It is no ground of defense that the mind or will did not concur in the act by which an injury was occasioned. The gist of the action is not the lawfulness of the action whence the injury proceeded, nor the existence of an evil intention, but is the fault of the defendant in neglecting to exercise such a reasonable degree of skill, or diligence, or caution, and prudent foresight, as, under the circumstances, might have avoided the injury. It would be useless to cite authorities in support of these familiar principles, of which the books

negligence as to render the person liable for an injury caused thereby.¹ So is leaving a loaded gun in a place where others may get at it. In an English case the plaintiff and defendant both lodged at the house of one L., where the defendant kept a gun loaded with types, in consequence of several robberies having been committed in the neighborhood. The defendant left the house and sent a girl, his servant, of the age of about thirteen or fourteen, for the gun, desiring L. to give it to her, and to take the priming out. L. accordingly took out the priming, told the girl so, and delivered the gun to her. She put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a child between eight and nine, saying she would shoot him, and drew the trigger. The gun went off, severely wounding the child. It was held that the defendant was responsible.² Officers of the militia are answerable in damages for injuries occasioned by the discharge of guns near or on the highway by the troops when under their charge.³ In a leading case in New

are full, nor is it necessary to occupy time in applying these principles to the facts of the case under consideration; their application is sufficiently obvious. The mere statement of the facts necessarily implies negligence and heedlessness on the part of the defendant. The act of taking a loaded gun into a place of public resort,—no necessity or cause being shown for doing so,—and leaving it exposed in the store, was an uncalled for and reckless act; and the very fact that the gun 'went off,' under the circumstances detailed in the proof, implies of necessity some inadvertent act or want of proper caution on the part of the defendant. The lock must either have been defective, or some agency must have been exerted, unintentionally and perhaps unconsciously, by the defendant, otherwise the discharge of the gun could not have happened; and in either view, the defendant is alike amenable for the consequences."

¹ *Cole v. Fisher*, 11 Mass. 137.

² *Dixon v. Bell*, 5 Maule & S. 198, the court saying: "The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has, unfortunately, proved that the order to L. was not sufficient; consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly, but I think the action is maintainable."

³ *Moody v. Ward*, 13 Mass. 299; *Cole v. Fisher*, 11 Mass. 137.

York, at a parade of a regiment of the national guard, it was the custom to fire with blank cartridges. In the front row of the spectators, about 350 yards from the line, a woman was sitting with a child in her lap. At the third discharge, a ball struck her and her child, wounding her and killing the child. The regiment was under the immediate command of its colonel, and the orders to fire were given by him personally, but he had caused to be taken all the precautions usual on such occasions to prevent the possibility of any piece being discharged with a ball-cartridge. It was held that the colonel was liable in damages.¹ In Massachusetts it has been ruled that a militia colonel who has dismissed his command after a parade is not liable in damages for the act of his men injuring a person on the highway while discharging their

¹ *Castle v. Duryea*, 32 Barb. 480; 2 Keyes, 169, the court saying: "No question can arise but that the assemblage of the men for drill and military exercise was perfectly legal; nor but that there was an utter absence of any intent to injure the plaintiff, or any other human being. The circumstance that one of the guns was loaded with a ball was, as far as the defendant was concerned, purely accidental. In a moral point of view, and upon the amount of damages to be recovered, it was a great alleviation that the defendant had taken all the usual precautions, and all which were deemed necessary to guard against such an accident. The fact, however, remains, that the plaintiff was shot by the discharge of a loaded gun, and that its discharge was ordered by the defendant. If it had occurred in the discharge of any public duty which belonged to the defendant to perform, and which he had no other means of performing, the question would have arisen which the judge put to the jury, whether all the precautions had been taken which the circumstances of the case required. For instance, if the defendant and his regiment had been called upon by the civil authority to quell a riot, and an innocent person had been shot, the

question would have been whether, under all the circumstances, all the precautions to prevent injury to innocent third persons which the case admitted of had been taken. But the defendant was not required by any public duty to cause his men to discharge their fire-arms at all while people were within musket-range. The manner in which he was to drill and instruct them depended essentially upon his judgment and discretion. He could have directed the firing to take place in the ravine where the target exercise occurred, or he could have stationed guards to keep off spectators at limits so remote from the parade that no injury could possibly ensue. If he could have been sure that only blank cartridges would be used, he might safely order the firing to take place as it did. . . . It is not the law that if one supposing a musket to be unloaded, or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything which could injure another."

pieces there, though the captain of the company might be.¹

ILLUSTRATIONS. — A after washing out his gun went to the door of his shop and discharged it for the purpose of drying it, the shop door being near the highway. The plaintiff's horse harnessed to a chaise was fastened by a bridle to a fence across the highway. The noise frightened the horse, which broke its bridle, and running away injured the chaise. *Held*, that A was liable for the damage: *Cole v. Fisher*, 11 Mass. 137. The defendant had been out with his gun, and was asked by the plaintiff to aid him and his servant in driving an unruly cow across the river. He complied, and while doing so, punched the cow with his loaded gun, and in replacing it across his horse, the hammer struck the saddle and caused it to fire, by which the plaintiff's servant was shot and killed. *Held*, that he was liable: *Morgan v. Cox*, 22 Mo. 373; 66 Am. Dec. 623.² The defendant sold to two boys of ten and twelve powder and ball-cartridges to use in a toy pistol. A statute prohibited the sale of pistol-cartridges to minors. The boys left the pistol, loaded with one of the cartridges, in a place where a younger boy six years old picked it up and discharged it, thereby killing one of the boys who purchased the cartridges. *Held*, that the boy's father might maintain an action against the defendant: *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 508. The defendant, as president of a political club, ordered a display of fire-works in a public street in front of a building where a meeting of the club was being held. He paid for the fire-works, the money being raised by individual subscriptions. The fire-works exploded

¹ *Moody v. Ward*, 13 Mass. 299.

² The court saying: "Every person, however, who is performing an act is bound to take some care in what he is doing. He cannot exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. *Sic utere tuo ut alienum non ledas*. And therefore, although the mere exercise of a right is not a wrong in any case, any negligence in the exercise of it that causes a loss to another is an injury, conferring upon him a right of action. It is correctly said that, generally, between persons standing in no particular relation to each other, that alone is reasonable care which, in the judgment of men in general, is proportionate to the probability of injury to others; and consequently, he who

does what is more than ordinarily dangerous is bound to use more than ordinary care. The defendant here had a dangerous instrument in his hands, and it was his duty to take proportionate care in handling it. The punching of the cow was a careless use of it, surrounded as he was by others; and although the accident did not then occur, it was no doubt occasioned by accidentally striking the hammer against the saddle, upon returning the gun to the horizontal position in which the defendant had carried it, without elevating the muzzle. The accident, in all probability, would not have occurred had the defendant taken that care of the gun that it was his duty to have taken of it while it was loaded, and he himself was surrounded by those whom it might injure if it accidentally fired."

and injured the plaintiff. *Held*, that the defendant was liable: *Jenne v. Sutton*, 43 N. J. L. 257; 39 Am. Rep. 578; and see *Fisk v. Wait*, 104 Mass. 74. A person was sitting on a fence, holding a cocked and loaded gun in his lap. It was discharged through his pointing it or the turning of the rail, and wounded his companion. *Held*, that the question of his negligence was for the jury: *Moebus v. Becker*, 46 N. J. L. 41

§ 1146. **Explosion of Steam-boilers.** — The owner or proprietor of a steam-boiler is liable for injuries caused by its exploding only where he has been guilty of some negligence. If the boiler has in it no defect known to him, or which is discoverable by the application of known tests, and it is operated with care and skill, he is not answerable to a person injured, or to an adjacent proprietor, for damages caused by its explosion.¹ In an action for injuries caused by the explosion of a steam-boiler, the fact that it was purchased of a reputable manufacturer is relevant.² The fact of the explosion raises a presumption of negligence sufficient to cast the burden on the defendant to prove that there was no negligence.³

ILLUSTRATIONS. — S., the owner of a boiler, entered into a partnership with Y. and T. for the operation of a grist-mill on certain days, S. having the right on other days to run his own saw-mill with the boiler. Y. and T. became under the arrangement owners of one undivided fourth part each of the boiler, which then was in good condition. Afterwards, while running S.'s saw-mill, the boiler exploded. *Held*, in the suit of one injured by the explosion, that Y. and T. could not be made liable: *Young v. Bransford*, 12 Lea, 232. A was passing through a street just as a new boiler was about being tested. He was told to leave, and that it was not safe for him to stop. He did not leave, however. The boiler was recklessly tested, and exploded,

¹ *Loosee v. Buchanan*, 51 N. Y. 476; 42 How. Pr. 385; 10 Am. Rep. 623; *Spencer v. Campbell*, 9 Watts & S. 32; *Marshall v. Welwood*, 38 N. J. L. 339; 20 Am. Rep. 394; *Witte v. Hague*, 2 Dowl. & R. 33.

² *Loosee v. Buchanan*, 51 N. Y. 476; 42 How. Pr. 385; 10 Am. Rep. 623.

³ *Fay v. Davidson*, 13 Minn. 523. Proof that the servants of a cotton-press company suddenly let off all the

steam and hot water in an engine into a plank flume extending to within six feet of a plank bridge nearly two hundred feet distant, whereby B, crossing the bridge, was blinded, precipitated into the gutter below, and scalded to death, held not to establish gross negligence on the part of the company entitling her to any exemplary damages: *Southern Cotton Press etc. Co. v. Bradley*, 52 Tex. 587.

injuring A. *Held*, contributory negligence: *Ochsenbein v. Shapley*, 85 N. Y. 214.

§ 1147. **Blasting Rocks.**—Persons blasting rocks and not taking proper precautions to prevent injury to others are liable therefor.¹ Negligence may arise from the blast not being properly set, covered, or fired,² or from the failure to warn passers-by.³ The fact of the injury has been held to raise a presumption of negligence, i. e., that the blast was not properly covered or fired.⁴ So also has the fact that the precautions required by a city ordinance had not been taken.⁵ Where the resulting injury is to the freehold or possession of another, the question of negligence does not arise. A man has a right to immunity from such invasions of his right of property or possession, irrespective of the question whether the person making such invasion was in the exercise of ordinary care or not.⁶ Where a house is injured from blasting, the action may be brought either by the owner or the tenant,—the former for the injury to his property, the latter for the injury to his possession.⁷ But the owner is not liable for the act of an independent contractor.⁸ In some states it is held that injuries to adjacent houses, and other real property, caused by a railway company in blasting rocks in the necessary work of constructing its road, authorized by its

¹ 1 Thompson on Negligence, 113. In an action for an injury sustained by a passer on a highway on the lands of the A mining company by being struck by a stone from a blast fired by the B mining company, evidence of an agreement between the companies that each may throw rocks on the other's adjacent premises in blasting is incompetent: *Beauchamp v. Mining Co.*, 50 Mich. 163; 45 Am. Rep. 30.

² *Ulrich v. McCabe*, 1 Hilt. 251. Defendant cannot answer that the profits of the business do not warrant the expense of such precautions. The question of necessity therefor is for the jury: *Beauchamp v. Mining Co.*, 50 Mich. 163; 45 Am. Rep. 30.

³ *Driscoll v. Newark etc. Co.*, 37 N. Y. 637; 97 Am. Dec. 761.

⁴ *Ulrich v. McCabe*, 1 Hilt. 251.

⁵ *Devlin v. Gallagher*, 6 Daly, 494.

⁶ *Hay v. Cohoes Co.*, 2 N. Y. 159; 3 Barb. 42; 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163; 51 Am. Dec. 284; *Scott v. Bay*, 3 Mo. 431; *Gourdier v. Cormack*, 2 E. D. Smith, 200.

⁷ *Gourdier v. Cormack*, 2 E. D. Smith, 200; *Hardrop v. Gallagher*, 2 E. D. Smith, 523.

⁸ *Pack v. New York*, 8 N. Y. 222; *McCafferty v. R. R. Co.*, 61 N. Y. 178; 19 Am. Rep. 267.

charter, are not wrongful acts for which an action will lie; but the damages thereby occasioned are to be assessed by commissioners, under the statute providing for the assessment of damages caused by the taking and damaging of property in the making and maintaining of such roads.¹ But this does not include those damages which are not necessarily incident to the doing of the act thus authorized and made lawful. Thus if such a company, in so blasting rocks, scatters loose stones upon the land of an adjacent proprietor, it will be liable.² That the defendant superintended the blasting, and gave orders concerning it, is sufficient, *prima facie*, to sustain a judgment for damages against him, without proof respecting the contract or capacity in which he acted.³ A written notice given by the owner of an adjacent lot to the plaintiff of an intention to blast rock thereon is *prima facie* evidence to charge the sender of such notice with liability for an injury to the plaintiff's possession subsequently caused by rocks being blasted thereon, so as to cast upon him the burden of showing that the mischief was the work of others for whom he was not responsible.⁴

ILLUSTRATIONS. — Defendant entered into a contract with the state of New York to enlarge a public canal. In carrying out the contract he used gunpowder in blasting rock and hard earth, and missiles were hurled against plaintiff, who was at work on premises near the canal, injuring him. *Held*, 1. That defendant had no such delegation of sovereign power from the state as to allow him to produce direct injuries to third parties, although the blasting might have been a necessary act; 2. That, whether defendant was negligent or not, he was liable for the injury to plaintiff; 3. That defendant was bound either to adopt such precautions as would prevent such missiles from reaching the place where plaintiff was, or to give him personal and timely notice of the blast; 4. That defendant could not be regarded as the agent of the state, he being a mere contractor

¹ Dodge v. County Comm'rs, 3 Met. 380; Whitehouse v. R. R. Co., 52 Me. 208; Sabin v. R. R. Co., 25 Vt. 363.

² Whitehouse v. R. R. Co., 52 Me. 208.

³ Hardrop v. Gallagher, 2 E. D. Smith, 523.

⁴ Gourdiar v. Cormack, 2 E. D. Smith, 200.

to do the work in a lawful manner: *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258.

§ 1148. **Contagious Diseases — Unwholesome Food.**—

A landlord who lets premises knowing that they are infested with a contagious disease, or in a condition likely to cause a disease, without notifying the lessee, is liable to the latter, in case the disease is communicated to him, for the damages thereby sustained.¹ In a New York case a physician attended a woman who died of small-pox, and subsequently employed the plaintiff to whitewash the house in which the death occurred. The plaintiff, who knew the woman had died of the small-pox, entered and whitewashed the house, relying upon the assurances of the defendant that the house had been thoroughly disinfected, and that he would be entirely safe in so doing; but plaintiff having contracted the disease in the house, he subsequently brought an action to recover the damages sustained thereby. The court held that the relation between the parties was that of master and servant; and that the plaintiff was entitled to recover in case the jury should find, on all the facts, that the plaintiff did not act rashly and inexcusably in entering the house under the employment, and that the defendant had not warned him of the danger.² While the authorities of a city may remove from the city persons infected with small-pox, yet they are liable for negligence in doing so, and for removing them in stormy weather and putting them in an unsafe and unprotected tent, whereby they are so exposed that death ensues.³ One who holds himself out to the public as a caterer is liable to the parties who partake what he has provided for them, in case such parties

¹ *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164; *Cutter v. Hamlen*, 147 Mass. 471. A county is not liable to the inmates of its jail for permitting it to remain in a condition which causes them to become sick and dis-

eased: *Pfefferle v. Lyon Co.*, 39 Kan. 432.

² *Span v. Ely*, 8 Hun, 256.

³ *Aaron v. Broiles*, 64 Tex. 316; 53 Am. Rep. 764.

thereby suffer from eating unwholesome food, as, for instance, one who buys a ticket for a supper at a public ball.¹

ILLUSTRATIONS.— Defendant took his children when they had whooping-cough, a contagious disease, to the boarding-house of plaintiff to board. Her child, and the children of the other boarders, contracted the disease, whereby she was put to expense, care, and labor in consequence of her child's sickness, and sustained pecuniary loss by reason of boarders being kept away. *Held*, that defendant was liable for damages: *Smith v. Baker*, 19 Cent. L. J. 173.

¹ *Bishop v. Weber*, 139 Mass. 411; 52 Am. Rep. 715, Allen, J., saying: "If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such by those who arrange for an entertainment to furnish food and drink for all who may attend it, and if he undertakes to perform the services accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment and partakes of the food furnished by him as to be liable to an action of tort for negligence in furnishing unwholesome food whereby such person is injured. The liability does not rest so much upon an implied contract as upon a violation or neglected duty voluntarily assumed. In-

deed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have the right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties: *Norton v. Sewall*, 106 Mass. 144; 8 Am. Rep. 298; *Longmeid v. Holliday*, 6 Ex. 761; *Pipin v. Shepard*, 11 Price, 400."

CHAPTER LIX.

INJURIES ON REAL PROPERTY.

- § 1149. Owners of premises — No duty towards trespassers or sight-seers.
- § 1150. Spring-guns, and defense of property.
- § 1151. Persons invited expressly or impliedly.
- § 1152. Proprietors of places of public resort.
- § 1153. Railroad stations—Vessels—Wharves—Toll-bridges.
- § 1154. Injuries to third persons from defective condition of leased property
— When lessor and when lessee liable.
- § 1155. Who are occupiers—When landlord liable.
- § 1156. Liability of landlord to tenant.
- § 1157. Excavations and obstructions on one's land near highway.
- § 1158. On public streets.
- § 1159. Areas under sidewalks.
- § 1160. Objects falling upon travelers.
- § 1161. Snow and ice on roofs—On sidewalks.
- § 1162. Telegraph wires in streets.
- § 1163. Objects frightening horses.
- § 1164. Permissible obstruction in streets—Building materials.

§ 1149. **Owners of Premises—No Duty towards Trespassers or Mere Sight-seers.** — The owner of private grounds or buildings is not obliged to keep them safe, so that no injury shall result to trespassers or those who go where they are not invited, but merely from curiosity or motives of private convenience in no way connected with either business, social, or other relations with the occupant.¹ A land-owner who maintains upon his premises a machine not intrinsically dangerous is not liable in damages to one who, without invitation, comes upon the land hoping to obtain employment, and while there is injured through the breaking of the machine

¹ *Hargreaves v. Deacon*, 25 Mich. 1; *Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Evansville etc. R. R. Co. v. Kohn v. Lovett*, 44 Ga. 251; *Gautret v. Egerton*, L. R. 2 Com. P. 371; *Hounsell v. Smith*, 7 Com. B., N. S., 731; 783; *Larmore v. Iron Co.*, 101 N. Y. 391; 54 Am. Rep. 718; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Dec. 660; *Frost v. R. R. Co.*, 10 Allen, 387; 87 Am. Dec. 668; *Parker v.*

caused by a defect therein which the owner could have discovered by the exercise of reasonable care.¹ He is not under obligation to strangers to put guards around excavations made by him, unless such excavations are so near a public highway as to be dangerous, under ordinary circumstances, to persons passing upon the way and using ordinary care to keep upon the proper path; in which case, he must take reasonable precautions to prevent injuries happening therefrom to such persons.² And where one is expressly or impliedly invited to come upon another's private premises, the latter must use care and prudence to prevent injury to him, and must warn him against such dangers as he cannot discover for himself.³

ILLUSTRATIONS. — The guests of a tenant occupying a house on the rear end of a lot, instead of using a way which the landlord had opened for their egress through an adjoining lot,—the direct egress being obstructed by some building operations on the front of the lot,—undertook to grope their way through such unfinished buildings at night, and were injured. *Held*, that the defendant was not liable: *Roulston v. Clark*, 3 E. D. Smith, 366. The plaintiff, in going to a fire in an adjoining house, ran through the defendant's store, and fell into an excavation in the yard in the rear. *Held*, that the defendant was

¹ *Larmore v. Iron Co.*, 101 N. Y. 391; 54 Am. Rep. 718.

² *Overholt v. Vieths*, 93 Mo. 423; 3 Am. St. Rep. 557.

³ *Corby v. Hill*, 4 Com. B., N. S., 556; *Sweeny v. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644. It is laid down that where one visits the private house of another as a social guest, the owner is bound to take the same care of him that he takes of himself and the other members of his establishment, and no more. A declaration averred that the defendant was possessed of a hotel, into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff, by the permission of the defendant, and with his knowledge, and without any warning from him, law-

fully opened for the purpose aforesaid, as a door which was in proper condition to be opened; nevertheless, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, and by reason of the said door being in such an insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff. It was held that the declaration disclosed no cause of action against the defendant, the plaintiff being at the hotel, not as a guest for a reward paid to the proprietor, but as a guest in a social way, the case stood on the same grounds as if it had been a private house: *Southcote v. Stanley*, 1 Hurl. & N. 247.

not liable: *Kohn v. Lovett*, 44 Ga. 251. A woman crossing the defendant's unfenced grounds, as many persons were accustomed to do, in order to make a short cut and avoid an angle in the street, fell into an open and unguarded vault. *Held*, that the defendant was not liable: *Stone v. Jackson*, 16 Com. B. 199. The defendant corporation, in working its coal mine, threw out a pile of slack on its own land. The pile presented the appearance of coal ashes. The land was not fenced. A stranger in the neighborhood, in passing over the slack, was burned. *Held*, that he had no right of action against the corporation: *McDonald v. R. R. Co.*, 35 Fed. Rep. 38. An adult was crossing A's land without right, except that persons with A's knowledge were in the habit of constantly crossing it. He fell into a pool of water, over which a crust had so formed that it resembled dry land, and was drowned. *Held*, that an action against A was not maintainable: *Union Stock Yards v. Rourke*, 10 Ill. App. 474. A laborer employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatch-way and broke his leg. *Held*, that the owners of the vessel were not liable: *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514. An employee of the owner of a mine, having a few moments' leisure, went into another room in the mine to see some fellow-workmen, and was killed by the falling in of the roof. *Held*, that the owner was not liable, although he had acquiesced in a custom among the miners to visit each other when not actively engaged: *Wright v. Rawson*, 52 Iowa, 329; 35 Am. Rep. 275. A person wishing to consult a surgeon, whom he erroneously supposed to be attached to a foreign steamship, about bringing his family to this country, went to the wharf on a day of the week other than that when only it was open to the public in the gate-keeper's discretion. Upon finding the gate open, he went in with a companion, without objection, and reached her deck by a freight gang-way. There a supposed officer met them, who said, "Well, gentlemen," and who, after the reply, "Good day; please direct us to the doctor's cabin," pointed along a covered passage-way, saying, "Go along that passage, and it is a little beyond the end of it." Thereupon he followed his companion along the passage-way, and as he was emerging therefrom, upon his companion saying, "Look at those fellows down there," he turned his head, and almost immediately was struck in the back and knocked into the hold by a bag of flour about to be lowered through an adjoining hatch, at which the vessel was being loaded. *Held*, that the plaintiff was a mere licensee, if not a trespasser, and that he could not recover of the owner of the vessel for the injuries thus sustained: *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66.

The defendant had contracted to do certain work on a plot of ground where buildings were erected, and excavations were going on. To carry out the work, he, by his men, worked a steam winch and crane, with a chain and iron tub attached thereto. The deceased was employed by the owner of the ground to watch the materials and buildings. He had no duty to take part in the excavating, and it was no part of his business to stand under the tub as it was raised. While watching the men working, the tub fell on his head and he was killed. *Held*, that the defendant was not liable. The deceased was there to watch the materials and buildings. He had no business with the machinery, nor any duty to watch the defendant's men at their work. He was thus in a place where he had no right to be, and was a mere licensee, to whom the defendant owed no duty: *Bachelor v. Fortesque*, 47 J. P. 308 (Eng.). Defendant was the landlord of a house which was let out in apartments to several tenants, each of whom had the privilege of using the roof (which was flat and covered with lead, having an iron rail on its outer edge) for the purpose of drying their linen; the access to the roof being by means of a low door at the stair-head, about two feet from the rail. Plaintiff, the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when, his foot slipping and the rail being out of repair (and known by the landlord to be so), he fell through to the court-yard below and was injured. *Held*, that the mere license to the lodgers to use the roof as a drying-ground imposed no duty upon defendant to fence it, or to keep the fence in repair: *Ivay v. Hedges*, L. R. 9 Q. B. Div. 80. M., while crossing the private grounds of a railroad company, fell into an unprotected pit between the tracks and was injured. He had often crossed there before, and so had other persons. There was at most only a license by the company to cross, and no invitation. *Held*, that defendant was not liable: *Morgan v. R. R. Co.*, 19 Blatchf. 239.

§ 1150. **Spring-guns, and Defense of Property.**—It has been held in England that a trespasser having notice that spring-guns are laid upon the premises cannot recover in an action against the owner thereof for injuries sustained thereby.¹ And that when a trespasser without such notice is injured in the same way, he may recover in such an action.² By an English statute it is

¹ *Flott v. Wilkes*, 3 Barn. & Ald. 304.

² *Bird v. Holbrook*, 4 Bing. 628; *Flott v. Wilkes*, 3 Barn. & Ald. 304.

made a misdemeanor to set out spring-guns or man-traps on one's premises, which are calculated to destroy human life or inflict grievous bodily harm, except in the case of traps set to destroy vermin, and engines set from sunset to sunrise in dwelling-houses for the protection of the same.¹ Subsequent to this statute, it was held in England that the owner of a dog which was impaled upon a spear fixed on trees to kill trespassing dogs was not entitled to damages, he having had notice that the spear was there;² and that this would be so, even if the plaintiff had not notice, on the ground that the setting of a dog-spear was not *per se* an illegal act, nor rendered such by the statute. The correctness of the position of the court of common pleas in *Bird v. Holbrook*,³ that, independently of the statute, the setting of spring-guns without a notice was an unlawful act was questioned. In *Wootton v. Dawkins*,⁴ the plaintiff entered the defendant's garden at night, and without permission, to search for a stray fowl. While there he came in contact with a wire, which caused something to explode with a loud noise, knocking him down, and slightly injuring his face and eyes. The plaintiff was nonsuited, the court holding that at common law the defendant was not liable for this injury; that, under the statute, it was not enough that the instrument was calculated to create alarm; that in the present case there was no evidence that the injury was caused by a spring-gun or other engine calculated to destroy human life or inflict grievous bodily harm. In a Connecticut case decided in 1840,⁵ the right of an owner to defend his property in his absence by means of engines or poisons placed so as to kill or injure trespassing men or animals was discussed at length upon principle and

¹ 7 & 8 Geo. IV., c. 18, sec. 1; 24 & 25 Vict., c. 100, sec. 31.

² *Jordin v. Crump*, 8 Mees. & W. 782. And see *Deane v. Clayton*, 4 Taunt. 489.

³ 4 Bing. 628.

⁴ 2 Com. B., N. S., 413.

⁵ *Johnson v. Patterson*, 14 Conn. 1; 35 Am. Dec. 96.

in view of the English authorities, and it was held that no such right exists in Connecticut. In a subsequent case in the same state¹ the subject received a thorough examination. The defendant was indicted for a nuisance in placing spring-guns in his blacksmith-shop, so as to endanger passers-by on the highway. The jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars; that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the traveled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside, and double-boarded on the outside, but that it was possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and that the traveling public were afraid of the guns. The court held that the apprehension of fear shown was not sufficient; that the mere act of setting spring-guns on one's own premises for their protection is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger; that what a man may not do directly he may not do indirectly; that a man may not, therefore, place instruments of destruction for the protection of his property, where he would not be authorized to take life with his own hand for its protection; that the right to take life in defense of property, as well as of person and habitation, is a natural right, but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one; that in the absence of any statutory provision making it burglary to break and enter a shop in the night-time with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention

¹ *State v. Moore*, 31 Conn. 479; 83 Am. Dec. 159.

of such a crime; but that the habits of the people and other circumstances have so greatly changed since the ancient rule was established that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property; that breaking and entering a shop in the night season with intent to steal is, by the law of Connecticut, burglary; and that the placing of spring-guns in such a shop for its defense would be justified if the burglar should be killed by them; that the guns would, however, constitute a nuisance if they cause actual danger to passers-by in the street; but that the danger to the public must be of a real and substantial nature. In a Kentucky case it has been held that where a person has valuable property in a strong warehouse well secured by locks and doors, he may, as an additional security at night, erect a spring-gun which can only be made to explode by entering the house; and if a slave in endeavoring to break into the warehouse is killed by such spring-gun, the owner of the warehouse will not be liable to the master of the slave for his value.¹ In Connecticut, where the defendant had notified the plaintiff that he had sprinkled poisonous meal on the ground, and that if he did not keep his chickens away they would be poisoned, and the plaintiff did not restrain them, but they went on the land of the respondent, ate the poisoned meal, and died, it was held that the defendant was liable in damages.² This case goes further than an early English case, where it was held that if a man place dangerous traps baited with flesh in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept on his neighbor's premises, must probably be attracted by

¹ Gray v. Combs, 7 J. J. Marsh. 478; 23 Am. Dec. 431.

² Johnson v. Patterson, 14 Conn. 1; 35 Am. Dec. 96.

their instinct into the traps, and if in consequence of such act his neighbor's dogs are so attracted, and thereby injured, he is liable in damages.¹

ILLUSTRATIONS. — Defendant set a spring-gun in his vineyard to protect his fruit from trespassers who were in the habit of invading it. Plaintiff, having no knowledge of the gun, entered the vineyard for the purpose of stealing fruit, and was injured by a discharge of the gun. *Held*, that he was entitled to recover damages for the injuries sustained thereby: *Hooker v. Miller*, 37 Iowa, 613; 18 Am. Rep. 18.

§ 1151. **Persons Invited Expressly or Impliedly.** — The owner or occupant of premises is bound to keep them safe as to all persons coming at his invitation, express or implied, on any business to be transacted by or with him, or on his premises, and this extends to the land, the house, and the access to it.² A warehouseman is bound to keep

¹ *Townsend v. Wathen*, 9 East, 277. As to injuries to animals caused by ferocious dogs, see further, *post*, Division III., Title Animals.

² *Carleton v. Franconia Iron Co.*, 99 Mass. 216; *Bennett v. R. R. Co.*, 102 U. S. 577; *Indermaur v. Dames*, L. R. 1 Com. P. 274; L. R. 2 Com. P. 311; 36 L. J. Com. P. 181; *White v. France*, L. R. 2 Com. P. Div. 308; *Chapman v. Rothwell*, El. B. & E. 168; 4 Jur., N. S., 1180; 27 L. J. Q. B. 315; *Freer v. Cameron*, 4 Rich. 228; 55 Am. Dec. 663; *Luddington v. Miller*, 4 Jones & S. 1; *Ackert v. Lansing*, 59 N. Y. 646; *Gilbert v. Nagle*, 118 Mass. 278; *Elliott v. Pray*, 10 Allen, 378; 87 Am. Dec. 653; *Welch v. McAllister*, 15 Mo. App. 492; *McKee v. Bidwell*, 74 Pa. St. 218; *Oyshterbank v. Gardner*, 49 N. Y. Sup. Ct. 263; *Donaldson v. Wilson*, 60 Mich. 86; 1 Am. St. Rep. 487; *Houston etc. R. R. Co. v. Boozer*, 70 Tex. 530; 8 Am. St. Rep. 615; *Gilbert v. Nagle*, 118 Mass. 278, the court saying: "A shop-keeper who invites the public to his shop to inspect and purchase the wares and articles which he has on exhibition is bound to keep his premises in a reasonably safe condition for the purposes for which they are used. If they are not in such con-

dition, and a person is injured thereby while examining or purchasing his wares, and while in the exercise of due care, and in no wise transcending the license thus given to examine, the shop-keeper is liable in an action for the injury. How far a visitor may touch or handle the wares exposed for sale depends upon the nature and character of the article, and the uses for which it is intended. Some articles it would be improper or unnecessary to touch; others must be examined by the hand in order to determine their quality or fitness. To what extent the visitor may exercise this privilege of examination is to be determined upon the facts of each case." As to who are within this protection, it is said in the leading English case of *Indermaur v. Dames*, L. R. 1 Com. P. 274, L. R. 2 Com. P. 311: "We are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class, for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and

the approaches on his premises safe for the use of his customers. Unless he does so, he is liable for an injury, although no one may ever have been hurt before.¹ One who neglects to comply with the statute requiring openings for elevators to be protected by railing and trap-doors is guilty of negligence *per se*.² Where the owner of a city lot has for years suffered the public to cross the lot on foot, it is his duty, on making an excavation in the path for a building, to place a guard or warning there, and he is liable to one who in endeavoring to cross is injured by the absence thereof.³

But the liability does not extend to parts of the premises not intended for visitors, and to which they are neither invited nor expected to go;⁴ nor where the injury is received in consequence of entering, not by the usual way, but by a route not intended for visitors or

practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, — such as a trap-door left open, unfenced, and unlighted. This protection does not depend upon the fact of a contract being entered into in the way of the shop-keeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shop-keeper, with a view to business which concerns himself. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shop-keeper, and as much entitled to protection during this accessory visit, though it might not be for the shop-keeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees,

or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

¹ Nave v. Flack, 90 Ind. 205; 46 Am. Rep. 205.

² McRickard v. Flint, 13 Daly, 541.

³ Graves v. Thomas, 95 Ind. 361; 48 Am. Rep. 727.

⁴ Murray v. McLean, 57 Ill. 378. Zoebisch v. Tarbell, 10 Allen, 385; 87 Am. Dec. 660; McKee v. Bidwell, 74 Pa. St. 218. And see Wilkinson v. Fairrie, 1 Hurl. & C. 633.

customers to use;¹ nor where the person comes at an unusual hour. In a Vermont case, the plaintiff went to the defendant's house late in the evening, to buy six bushels of oats. The defendant had no oats to sell, but yielding to the plaintiff's importunities, he consented to sell him the oats to accommodate him. The defendant always kept his granary locked; but he obtained the key by sending some distance for it, and went with the plaintiff to the upper floor of the granary, where the oats were, and while the defendant stepped back to get a measure, the plaintiff, walking about the floor in the dark, fell through an aperture therein and was injured. It was held that the defendant was not liable for the injury.² In an Illinois case it is said that if private warehousemen, merchants, blacksmiths, millers, or other persons engaged in business, construct approaches to their places of business, knowing the same to be defective, or have trap-doors known to be unsafe, where their customers must necessarily pass, and such defects are concealed, or not apparent, they will be liable for any injury resulting therefrom. But unless a person is under some public duty to repair a way, even

¹ *Victory v. Baker*, 67 N. Y. 366; *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262.

² *Pierce v. Whitcomb*, 48 Vt. 127; 21 Am. Rep. 120, the court saying: "In this case although the defendant did not wish to sell the oats, and only yielded to the importunity of the plaintiff, and, to his own inconvenience, went to his granary late at night to favor and accommodate the plaintiff, yet, allowing the plaintiff to go into the granary with him to take the delivery of the oats, we think, the defendant did assume the duty to the plaintiff that the means of access was reasonably safe. And if the plaintiff, on going to or returning from the oats, or in putting them into bags and taking the delivery, while doing that matter of business, had accidentally, without warning, slipped into a pitfall, it would have been a very different case. The granary was a private receptacle

of the defendant's grain, kept constantly locked. The plaintiff was permitted there for one simple specific matter of business, — to take six bushels of oats; the oats were shown him; to facilitate the delivery, the defendant went for his measure; he left the plaintiff at the oats, where he should be, in the dark, but in a safe place. The oats could be delivered at no other place, and no other matter of business was permitted to him there. If, for curiosity or other motive, he chose to occupy that moment in the darkness in wandering about the granary, and lost an eye by the point of a scythe, or stumbled over a horse-rake and maimed himself, or fell through a scuttle in the floor, he was doing what he was not invited or permitted by the defendant to do, and what was no part of the business in hand; and we think this departure was of his motion and at his risk."

though to his place of business, he will not be liable, on failing to do so, for injury thereby caused to others. In this case, the plaintiff having purchased grain of a warehouseman sent his servant to get it. The warehouse was situated on a wharf, and while he was in the office according to the rules adopted by the defendants, to receive a ticket for a load of grain, his horses, which had been hitched to a clog, backed over the side of the wharf and were drowned. The court held that the defendants were not under any legal duty to place guards on the wharf to prevent teams from falling into the water, or to provide places for hitching horses at their warehouse, and were not liable for an injury growing out of the want of such provision being made.¹ One entering the premises of another, whether by invitation or as a mere licensee, is himself bound to exercise ordinary care and diligence, and failing in this and suffering injury, he cannot recover.² But though a customer knows the approach to be dangerous, it is not necessarily negligent in him to use it.³ But in an action by A against B, his lessor, for injuries caused by the breaking down of a balcony where A was trying to carry a stove, where there was evidence that A knew of the weak condition of the balcony, it was held that B was entitled to an instruction that A could not recover if guilty of contributory negligence.⁴

ILLUSTRATIONS. — A clerk in a store invited a customer into a dark room in the store, and while there the latter fell into an open cistern in the room. *Held*, that the proprietor was responsible: *Freer v. Cameron*, 4 Rich. 228; 55 Am. Dec. 663. A gas-fitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly. The plaintiff, having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor and was injured. It was proved that

¹ *Buckingham v. Fisher*, 70 Ill. 121.

³ *Nave v. Flack*, 90 Ind. 205; 46 Am.

² *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262.

Rep. 205.

⁴ *Mullen v. Rinear*, 45 N. J. L. 520.

the premises were constructed in the manner usual in the defendant's business, — that of a sugar refiner, — but that the shaft could, when not in use, have been fenced without injury to the business. *Held*, that the defendant was liable: *Indermaur v. Dames*, L. R. 1 Com. P. 274; L. R. 2 Com. P. 311. A buyer having ordered some stoves of a wholesale firm whose office was in a basement and whose storage rooms were above, went in the afternoon to get them, and finding no one in the office, proceeded to the elevator way to call. The basement was dark, and in so doing, he fell into an elevator pit, of the existence of which he was ignorant, and was injured. Whenever he had previously been there he found a guard around the pit, but it had now been removed. *Held*, that a verdict in his favor should not be disturbed: *Harris v. Perry*, 23 Hun, 244. Several owners of adjoining lots had established for their own convenience a road along one line thereof connecting with a public alley at one extremity and a street at the other. One of the owners built a platform across it, so low that one sitting on a wagon could not drive under it. This had existed for many years, and the public had used the road in that condition. A man employed by one of the other owners in hauling merchandise on said road was killed by contact with the platform after dark, there being no light or other signal of warning, and being ignorant of the platform. *Held*, that no action would lie against the proprietor of the platform: *Cahill v. Layton*, 57 Wis. 600; 46 Am. Rep. 46. The plaintiff, a licensed waterman, having complained to a person in charge that a barge of the defendant's was being navigated unlawfully, was referred to defendant's foreman. While going along defendant's premises in order to see the foreman, the plaintiff was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger. *Held*, that the plaintiff was not a bare licensee, but was on defendant's premises by the invitation of defendant, and for a purpose in which both plaintiff and defendant had a common interest, and the defendant was liable for the injury: *White v. France*, L. R. 2 Com. P. Div. 308. The servant of a lumber dealer piled lumber in his yard so negligently that the wheel of a customer's wagon struck it, in consequence of one of the accidents of travel, causing it to fall on the plaintiff, a third person, while lawfully on the premises. *Held*, that the lumber dealer was liable: *Pastene v. Adams*, 49 Cal. 87. A policeman went into a business house at night through an upper window, to search for burglars whom he suspected to be at work there. He fell through a hoistway left open in violation of a city ordinance. *Held*, that the proprietors were liable: *Ryan v. Thomson*, 6 Jones & S. 133. There was a passage-way leading from a public street to the office of a brewery, which was

the regular means by which customers of the brewer passed to and fro. A customer who had visited the office on business and was retiring to the street fell into a trap-door in the passage-way, which the brewer or his servants had wrongfully left open, unguarded, and unlighted. *Held*, that the brewer was responsible: *Chapman v. Rothwell*, El. B. & E. 168. G., who was to receive a commission if she effected a sale of a sewing-machine, came to the dealer's shop with a person whom she had procured to buy the machine, and while there went to the rear of the shop, and in examining another machine which she had no intention of buying, fell through a trap-door and was injured. *Held*, that whether she was a trespasser was a question of fact for the jury: *Gilbert v. Nagle*, 118 Mass. 278. The plaintiff was injured by falling through a trap-door in the defendant's factory, in a portion of the building not open to the public, but designed only for workmen. There was no evidence that the plaintiff entered in consequence of any invitation or inducement, express or implied, on the part of the defendants. *Held*, that he could not recover damages therefor: *Zoebisch v. Tarbell*, 10 Allen, 385; 87 Am. Dec. 660. A cooper came to a tobacco warehouse to deliver barrels, according to his custom. Without the knowledge of any one on the premises, he went to the rear of the building, and there fell through the hatchway of a freight elevator, which was in use, and the bars protecting which were withdrawn. He knew of the existence of the hatchway, and, after the accident, stated that "he did not know what took him there; he had no business there at all." *Held*, that his administratrix could not recover damages: *Murray v. McLean*, 57 Ill. 378. The defendant dug a pit under a cotton-gin, near the highway, leaving it uninclosed, with corn and cotton-seed scattered about it. The plaintiff's cow, turned out to commons, remote from the gin, fell into it and was killed. *Held*, that defendant was liable: *Jones v. Nichols*, 46 Ark. 207; 55 Am. Rep. 575. The plaintiff had ordered some coals to be sent to a railroad station. The practice at the station was for the consignees to assist in tipping the trucks. For this purpose the plaintiff, to whom coals had been consigned, went along the flagged way, and was stepping down from the wagon after getting his coals, when some of the flags, being in a defective condition, gave way, and he was thrown down into the cellar and sustained severe injuries. The question was, whether the plaintiff came within the category of a mere licensee, or whether he came within the class of contractors who went on business common to both parties. *Held*, that he was not a mere licensee, and the defendant railroad was liable: *Holmes v. R. R. Co.*, L. R. 6 Ex.

123; L. R. 4 Ex. 254. Defendant permitted the public habitually to use his private bridge. He knew it to be unsafe. Plaintiff was injured by the breaking down of the bridge. *Held*, that he might maintain an action therefor: *Campbell v. Boyd*, 88 N. C. 129; 43 Am. Rep. 740. A leased the third and fourth floors of a building, of which B occupied the lower part. In the hall leading from the outer door to the stairs which gave access to the upper stories was a hatchway closed by a trap-door, occupying nearly all the passage-way, used by defendant, and open all day, but customarily shut from six to eight o'clock in the evening. A went to the premises between eight and nine o'clock in the evening, and the trap-door being open, fell through and was killed. *Held*, that B was liable in damages, and that A was not negligent in not having procured a light or otherwise inquired whether the trap-door was open: *Totten v. Phipps*, 52 N. Y. 354. Plaintiff went to a public house, by appointment, to meet a friend, and while waiting for his friend, fell through a hole in the floor, which was being repaired. *Held*, that the keeper was liable: *Uxford v. Prior*, 4 Week. Rep. 611. A statute provided that elevator openings in buildings should be guarded by railings, and imposed a penalty for violation. A police-officer, in pursuance of his duty, entered a building which he found open in the night-time, for the purpose of inspection, and fell through an unguarded elevator. *Held*, that the owner and occupant was liable: *Parker v. Barnard*, 135 Mass. 116; 46 Am. Rep. 450. Plaintiff fell down a hoistway, the approach to which defendant should have kept closed, but carelessly left open. Plaintiff, had he looked, would have ascertained the condition thereof, but failing to look, fell through and was injured. *Held*, that his action could not be maintained: *Brenstein v. Mattson*, 10 Daly, 336. W. was employed by the owner of a building occupied as a store to excavate a cellar underneath it. The building was raised and placed on posts. A clerk employed in the store, at the request of a customer, went into the cellar to get her hat, which had blown there, and while there the building fell and injured him. In an action against W. for the injury occasioned by the negligence in making the excavation, *held*, that the clerk was entitled to recover: *Lamparter v. Walbaum*, 45 Ill. 444; 92 Am. Dec. 225. In an action against a railroad company by one injured in stepping through a rotten plank on a station platform, it appeared that the plaintiff went there at the request of the owner of an animal killed on the track, the owner being unable to read, and desiring plaintiff to read a notice posted there. *Held*, that the plaintiff was properly there: *St. Louis etc. R. R. Co. v. Fairbairn*, 48 Ark. 491. M., a guest at a hotel, being assigned to a room which he had before occupied, and believing he could find it without difficulty, de-

clined the services of the bell-boy, which were proffered. Arriving at the end of the hall, where the room was situated, M., by mistake, opened a door which led into an elevator opening. It was at night, and the hall was dimly lighted. M., not discerning his mistake, stepped through the door, intending to strike a match and light the room, when he fell to the basement, receiving severe injuries. *Held*, that the conduct of the hotel-keeper in permitting the dangerous opening to remain unguarded amounted to gross negligence, and that M. could recover: *Heyward v. Merrill*, 94 Ill. 349; 34 Am. Rep. 229. P. having occasion to carry an advertisement to the defendant for publication in its newspaper late at night, found the counting-room closed. He thereupon proceeded to the editorial rooms, on the second floor. At the head of the stairs there was a hall; on the right hand, the door leading to the editorial rooms; and on the left, an elevator entrance with folding doors. P., being a stranger to the premises, and the hall being dark, in trying to find his way fell down the elevator way, the doors of which had been left open, and was seriously injured. *Held*, that his want of care and prudence having caused the injury, he could not recover: *Parker v. Portland Publishing Co.*, 69 Me. 173; 31 Am. Rep. 262.

§ 1152. **Proprietors of Places of Public Resort.**—A person who causes a building to be erected for viewing a public exhibition, and who admits persons on the payment of money, assumes an obligation analogous to that of a carrier towards a passenger. There is an implied warranty of care, not only on his part, but on that of any contractor or person who has erected the building or stand to which the public has been invited.¹ A person in letting his hall for a public purpose holds out to the public that it is safe, and he is bound to exercise proper care in providing safe arrangements for entrance and departure to those invited thereto.² So a religious society giving public notice of a meeting to be held at its church, and inviting members of other societies to attend, is liable

¹ 1 Thompson on Negligence, 311; *Frankfort Bridge Co. v. Williams*, 9 Francis v. Cockrell, L. R. 5 Q. B. 184, Dana, 403; 35 Am. Dec. 155; *Currier v. Boston Ass'n*, 135 Mass. 414. *Contra*, 501; *Brazier v. Polytechnic Institution*, 1 Fost. & F. 507; *Pike v. Polytechnic Institution*, 1 Fost. & F. 712; *Brown v. Kennebec Agricultural Society*, 47 Me. 275; *Latham v. Roach*, 72 Ill. 179;

² *Camp v. Wood*, 76 N. Y. 92; 32 Am. Rep. 282; *Currier v. Boston Ass'n*, 135 Mass. 414.

to one so invited and attending for a personal injury sustained by him by means of the dangerous condition of the premises.¹ But the proprietor of a public building or structure is not a warrantor or insurer that it is absolutely safe, but he impliedly warrants that it is safe for the purpose intended, save only as to those defects which are unseen, unknown, and undiscoverable.² Hence such a person is not responsible for latent defects in a staircase, whether in its construction or material, at the time he took the building, but is only responsible for a want of due care in failing to keep it in a reasonably safe condition, and is liable for repairing it in an improper manner, which tended to weaken it;³ and it is a proper question for the jury whether the proprietor had employed proper persons to make the alterations, and whether these persons had employed proper care and skill.⁴

ILLUSTRATIONS.—The plaintiff had been attending a ball at a public hall in the third story of an inn, and on coming away, instead of descending two flights of stairs, went out of a door left unlocked at the foot of the upper flight, and opening upon the roof of a piazza, and walking along the piazza roof, stepped off the unguarded end of it, and fell to the ground. *Held*, that the innkeeper was liable: *Camp v. Wood*, 76 N. Y. 92; 32 Am. Rep. 282. Proprietors of a fair-ground charging an admission had allotted a portion of the grounds for target-shooting, but gave no notice thereof. Plaintiff's horse, hitched where others were hitched, was shot. *Held*, that they were liable: *Conrad v. Clauve*, 93 Ind. 476; 47 Am. Rep. 388. Defendant owned pleasure-grounds on which was a hotel. A large number of people occupied the grounds one day on the occasion of a public meeting and celebration, and many of them were entertained at the hotel. During the afternoon a sudden and violent storm arose, and many people suddenly crowded upon the hotel piazza for shelter. The piazza, which was strong enough for ordinary uses, broke down, and plaintiff was injured. *Held*, that he could not maintain an action: *Converse v. Walker*, 30 Hun, 596. Plaintiff fell and was injured while going from

¹ *Davis v. Cong. Soc.*, 129 Mass. 367; 37 Am. Rep. 368.

² *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501.

³ *Pike v. Polytechnic Institution*, 1 Fost. & F. 712.

⁴ *Brazier v. Polytechnic Institution*, 1 Fost. & F. 507.

defendant's meeting-house after dark by a path eighteen feet wide, bounded by a wall eight inches above the path at the point where plaintiff fell, a street being on the other side of the wall two feet below the level of the path. The path was insufficiently lighted, and plaintiff did not see the wall. *Held*, that the questions of whether plaintiff was in the exercise of due care, and whether the way was reasonably safe, were for the jury: *Davis v. Cent. Cong. Soc.*, 129 Mass. 367; 37 Am. Rep. 368. The marshal of a county fair turned A's horse from the track to clear it for a race, and in doing so the horse broke loose and injured plaintiff. *Held*, that instructions that the marshal was not liable unless his act was one "which a person thus acting must have adjudged would, in the natural course of events," cause the injury, were erroneous, as he was liable if he negligently turned the team off the track, and A thereby lost control of it and broke loose and caused the injury: *Stevens v. Dudley*, 56 Vt. 158.

§ 1153. Railroad Stations—Vessels—Wharves—Toll-bridges.—The principles of the last section apply to persons, whether passengers or others, resorting to railroad stations.¹ The owner of a vessel is not bound to close the hatches at night, so as to protect from injury a trespasser, or one who has no right or license to be on the vessel.² While one on a vessel lying outside of another vessel at a wharf has a right to cross such other vessel, he cannot recover for an injury sustained by falling through a hatch-cover, the deck furnishing a safe passage.³ But when, in the discharge of his duty, a man tumbled down an unlighted open hatchway in a dark passage, it was held that the ship was liable.⁴ The proprietors or lessees of public wharves and piers are held to the same degree of care as attaches to carriers of passengers in case

¹ As to which, see *post*, Division III., Bailments—Carriers; *Toledo etc. R. R. Co. v. Grush*, 67 Ill. 262; 16 Am. Rep. 618; *Carpenter v. R. R. Co.*, 97 N. Y. 494; 49 Am. Rep. 540; *Snow v. R. R. Co.*, 136 Mass. 552; 49 Am. Rep. 40. A railroad company, the lessor of land leased for the purpose of keeping a hotel thereon, is not liable for an injury caused by a defective step or platform and an insufficient

light, to one who was going from the railroad platform to the hotel: *Texas etc. R. R. Co. v. Mangum*, 68 Tex. 342.

² *Baker v. Byrne*, 58 Barb. 438; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514.

³ *Anderson v. Scully*, 31 Fed. Rep. 161.

⁴ *The Guillermo*, 26 Fed. Rep. 921.

of an injury, through non-repair or other negligence, to any person coming thereon upon lawful business.¹ A dock-owner who, for a reward paid him by a ship-owner, supplies a dock and a gangway to enable persons to pass to and fro between the land and the ship is answerable in damages to any person who, having occasion to go on board the ship on business, is injured by the negligence of the dock-owner's servants in removing or placing the gangway in an insecure position, though he might not be so answerable to a mere volunteer going on board the ship without lawful business.² A city which is the owner of and controls a wharf, and collects tolls for the use thereof, is liable to an action for damages by the owners of a vessel which was destroyed by reason of the city authorities permitting a large quantity of pig-iron to remain upon the wharf an improper length of time, thereby causing the plaintiff's boat to be backed out into the stream, in consequence of which it was run into and sunk.³ This liability attaches to the person in actual possession of the wharf, irrespective of the question of ownership.⁴ Such a liability rests upon a lessee who is under covenants to repair, and who has the right to collect wharfage, although he may not have the exclusive possession.⁵ And

¹ 1 Thompson on Negligence, 316; *Carleton v. Franconia Iron Co.*, 99 Mass. 216; *Cannavan v. Conklin*, 1 Daly, 509; 1 Abb. Pr., N. S., 271; *Radway v. Briggs*, 35 How. Pr. 422; 37 N. Y. 256; *Moody v. New York*, 34 How. Pr. 288; 43 Barb. 282; *Swords v. Edgar*, 59 N. Y. 28; 1 Thomp. & C. 23; 44 How. Pr. 139; 17 Am. Rep. 295; *Wendell v. Baxter*, 12 Gray, 494; *Campbell v. Portland Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503; *Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497; *Railroad Co. v. Hanning*, 15 Wall. 649; *Macauley v. New York*, 67 N. Y. 602; *Smith v. London etc. Docks Co.*, L. R. 3 Com. P. 326; *Buckbee v. Brown*, 21 Wend. 110, 116; *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65; *Pennsylvania R. R. Co.*

v. Atha, 22 Fed. Rep. 920. So where the wharf is kept by a municipal corporation for profit: *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65; *Maxwell v. Philadelphia*, 7 Phila. 137; *McGuinness v. New York*, 52 How. Pr. 450; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Taylor v. New York*, 4 E. D. Smith, 559; *Buckbee v. Brown*, 21 Wend. 110; *Macauley v. New York*, 67 N. Y. 602.

² *Smith v. London etc. Docks Co.*, L. R. 3 Com. P. 326.

³ *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65.

⁴ *Cannavan v. Conklin*, 1 Daly, 509.

⁵ *Radway v. Briggs*, 37 N. Y. 256; 35 How. Pr. 422; *Campbell v. Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503.

if the defect existed when the lease was made, a covenant by the lessee to repair will not relieve the lessor from liability.¹ Still a lessor who has let a wharf and slip, and delivered exclusive possession to a lessee who covenants to repair, is not liable for damages that happen through obstructions that arise subsequently, of which the lessor has no notice.²

And the same liability attaches to the keepers of toll-bridges.³ If the proprietor of a toll-bridge knows of a defect therein dangerous to passengers, and not exposed, and takes toll from a passenger, and allows him to cross without warning, the proprietor is liable for damages; *aliter*, if the defect is not dangerous and likely to result in damage, but in the judgment of the proprietor slight, and thought to have been safely repaired; for the proprietor of a bridge is only liable for ordinary care and diligence, and beyond this is not an insurer.⁴ A bridge company is not liable for an injury received by a foot-passenger before nine o'clock in the morning, occasioned by the freezing of rain that had fallen on the sidewalk the previous night.⁵ But it should provide increased guards against new dangers caused by the use of its property for the purpose of a railroad, whether it permitted the railroad company the use of the bridge or it had been condemned for such use.⁶

ILLUSTRATIONS.—The plaintiff, without invitation or business, intruded upon a visibly ruinous but uninclosed freight-house of the defendants, used only for storage, and while there, a sudden storm blew a fragment of the building upon and him injured him. *Held*, that he was remediless: *Lary v. R. R. Co.*, 78 Ind. 323; 41 Am. Rep. 572. A customs officer, searching for a

¹ *Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Albert v. State*, 66 Md. 325; 59 Am. Rep. 159.

² *Moore v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 237.

³ *Frankfort Bridge Co. v. Williams*,

9 Dana, 403; 35 Am. Dec. 155; *Townsend v. Turnpike Co.*, 6 Johns. 90.

⁴ *Stokes v. Tift*, 64 Ga. 312; 37 Am. Rep. 75.

⁵ *Evers v. Hudson River Bridge Co.*, 18 Hun, 144.

⁶ *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263.

smugglers at a wharf where foreign vessels discharged, having no lantern, fell into the water through an opening left unguarded and unlighted in the wharf by the owner, and was injured. *Held*, that he could maintain an action therefor: *Low v. R. R. Co.*, 72 Me. 313; 39 Am. Rep. 331. At the time the New York and Brooklyn bridge was opened for travel, plaintiff, in attempting to cross, was caught in a crowd, thrown down, trampled on, and injured. A large force of policemen had been employed to preserve order, and the rush could not reasonably have been anticipated. *Held*, that an action against the bridge trustees could not be maintained: *Hannon v. Agnew*, 96 N. Y. 439. A coal merchant after obtaining from the owner exclusive use of a wharf and slip for which he paid a fixed price for all coal sold and shipped therefrom, was notified of a sunken pile as a dangerous obstruction near the pier. *Held*, that he was liable for subsequent damages therefrom to a vessel which his superintendent had directed to move from the spot; and this, notwithstanding any proved liability of the wharf-owner: *Onderdonk v. Smith*, 21 Fed. Rep. 588. In an action to recover of a railroad company for a horse and cart lost by falling into a river through alleged negligence of the company in not providing cap-logs for its pier, *held*, that the company might show that such logs would interfere with the loading of vessels in the course of its business: *Philadelphia etc. R. R. Co. v. Ervin*, 89 Pa. St. 71; 33 Am. Rep. 726. Plaintiff, the driver of a job-wagon, was injured by stepping into a hole in a wharf while attempting to carry a seaman's chest on board a vessel. The part of the wharf where the accident occurred was leased to A and B by the agents of the owners of the wharf for the purpose of loading and dispatching vessels, the agents being bound to repair. Persons going to the vessel were compelled by obstructions in other parts of the wharf to take the route which plaintiff took, which was through a shed. *Held*, that the owners and agents were liable for the injury: *Campbell v. Sugar Co.*, 62 Me. 552; 16 Am. Rep. 503. A was killed by falling through a pier of the defendants, which was in a decayed and unsafe condition. The pier was at the time leased to a person who had covenanted to keep it in good order and repair. The pier was in such a condition, at the time of the demise and delivery of possession to the lessee, that the owners knew, or were properly chargeable with knowledge, of its dangerous character. *Held*, that the owners were liable: *Swords v. Edgar*, 59 N. Y. 28; 17 Am. Rep. 295. A wharf extended outward below the water-line. A spike projected, which injured a vessel. *Held*, that *prima facie* the lessee and occupant of the wharf was chargeable with negligence: *Smith v. Havemeyer*, 32 Fed. Rep. 844. A, by devise, became the owner of a wharf subject to a lease which did not

require the lessor to repair, but which authorized him to do so. *Held*, that A was liable for personal injuries sustained by a stranger by reason of a defect in the wharf: *Ahern v. Steele*, 48 Hun, 517. A, knowing of a defect in his wharf, let it to B, who after learning of the defect, continued to use it as a public resort. *Held*, that for a personal injury sustained from the defect, A and B were jointly liable: *Joyce v. Martin*, 15 R. I. 558.

§ 1154. **Injuries to Third Persons from Defective Condition of Leased Property — When Lessor and when Lessee Liable.** — By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep the premises in repair that they may be safe for the public, and such occupier is *prima facie* liable to third persons for damages arising from any defect.¹

But the landlord is liable in two cases: 1. Where

¹ *Todd v. Flight*, 9 Com. B., N. S., 377; *Payne v. Rogers*, 2 H. Black. 350; *Regina v. Watts*, 1 Salk. 357; *Regina v. Watson*, 2 Ld. Raym. 856; 3 Ld. Raym. 18; *Russell v. Shenton*, 3 Q. B. 449; *Boyle v. Tamlyn*, 6 Barn. & C. 329; *Bent v. Haddon*, Cro. Jac. 555; *Broder v. Saillard*, 2 Ch. Div. 692; *Coupland v. Hardingham*, 3 Camp. 398; *Nelson v. Liverpool Brewery Co.*, 2 Com. P. Div. 311; *Tarry v. Ashton*, 1 Q. B. Div. 314; *O'Brien v. Capwell*, 59 Barb. 497; *Shindelbeck v. Moon*, 32 Ohio St. 264; 30 Am. Rep. 584; *Chauntler v. Robinson*, 4 Ex. 163; *Bishop v. Bedford Charity*, 1 El. & E. 697; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Gridley v. Bloomington*, 68 Ill. 47; *Blunt v. Aikin*, 15 Wend. 522; 30 Am. Dec. 72; *New York v. Corlies*, 2 Sand. 303; *Jaffe v. Hartean*, 56 N. Y. 398; 15 Am. Rep. 438; *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *City of Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775; *Dwinel v. Veazie*, 44 Me. 167; 69 Am. Dec. 94; *Union Brass Co. v. Lindsay*, 10 Ill. App. 583. A clause in lease of a farm and ferry making lessee liable to the lessor "for all damage occasioned by willful misconduct or neglect in the management of the farm and premises and in the management of the ferry and boat" applies only to such dam-

ages as might result to the lessor's reversionary interest from the misconduct or neglect of the lessee, but does not render the lessor liable for injuries done by the lessee to third persons: *Felton v. Deall*, 22 Vt. 170; 54 Am. Dec. 61. Thus a landlord is not liable for an injury to an invited guest of the tenant: *Marshall v. Heard*, 59 Tex. 266; or for an injury by the fall of an awning intended solely as a protection against sun and rain, the fall having been occasioned by the tenant's negligent conduct in permitting a crowd of people to stand upon it: *Kalis v. Shattuck*, 69 Cal. 563; 53 Am. Rep. 568. The owner of a building with a roof so constructed that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway is not liable to a person injured by such a fall upon him, while traveling upon the highway with due care, if the entire building is at the time let to a tenant who has covenanted with the owner "to make all needful and proper repairs, both internal and external," it not appearing that the tenant might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precaution have prevented the accident: *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76.

there is an express agreement between the landlord and the tenant that the former shall keep the premises in repair, so that, in case of a recovery against the tenant, the latter would have his remedy over against the landlord, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord.¹ A landlord who has covenanted to repair, but who has not been notified by his tenant to repair, is not liable for injuries sustained by a stranger upon the premises at the invitation of the tenant, although such injuries are the result of a failure to repair.²

2. Where the premises were in a defective condition at the time of the making of the lease,³ a lessor out of possession is liable to a third person for the continuance by his tenant of a nuisance arising from a privy-well and

¹ *Todd v. Flight*, 9 Com. B., N. S., 377; *Payne v. Rogers*, 2 H. Black. 350; *Nelson v. Liverpool Brewery Co.*, 2 Com. P. Div. 313; *Lowell v. Spaulding*, 4 Cush. 278; 50 Am. Dec. 775; *Benson v. Suarez*, 43 Barb. 408; *Clancy v. Byrne*, 53 N. Y. 129; 15 Am. Rep. 391; *Gridley v. Bloomington*, 68 Ill. 51; *Whalen v. Gloucester*, 6 Thomp. & C. 24. A promise to repair leased premises made by a landlord who is under no legal obligation to make repairs is without consideration, and cannot support an action. *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229.

² *Ploen v. Staff*, 9 Mo. App. 309.

³ *Rosewell v. Prior*, 2 Salk. 459; 12 Mod. 635; *Staple v. Spring*, 10 Mass. 72; *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 474; *Irvine v. Wood*, 51 N. Y. 228; 10 Am. Rep. 603; *Stephani v. Brown*, 40 Ill. 423; *Moody v. New York*, 43 Barb. 282; 34 How. Pr. 288; *Durant v. Palmer*, 29 N. J. L. 544; *Scott v. Simons*, 54 N. H. 426; *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217; *Center v. Davis*, 39 Ga. 210. And this rule is applicable to the successor to the title and possession of property who omits to abate a nuisance erected thereon by another: *Brown v. E. R. Co.*, 12

N. Y. 486; *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91; but see *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76; *Grinnell v. Eamer*, L. R. 10 Com. P. 638; *Petty v. Bickmore*, L. R. 8 Com. P. 401. One who permits an old and decayed plank sidewalk to remain along one side of a private way in the rear of premises which he has leased is not liable to one sustaining injury from the defective condition of the sidewalk: *Birnbaum v. Crowninshield*, 137 Mass. 177. The lessor of a building is not liable to one who, in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an unfenced adjoining embankment, although the premises were in that condition prior to the letting: *Mellen v. Morrill*, 126 Mass. 545; 30 Am. Rep. 695. In order that a landlord be liable to a third person who, on calling to visit a tenant, receives an injury from a hole in the oil-cloth on the stairs of the tenement, it is necessary that knowledge of the defect should have been brought home to the landlord: *Henkel v. Murr*, 31 Hun, 28.

private sewer, which were defectively constructed or out of repair when the premises were leased.¹ The landlord, and not the tenant, is liable for injuries caused by neglect to repair a building abutting on a highway, and to keep it in safe condition for passers-by, where he is bound to make necessary repairs, and has the control of the outside doors and passage-ways for that purpose, and keeps the keys, and opens and closes the doors at certain hours fixed by the tenant.² But in order that the person who has erected a nuisance shall be liable for its continuance after he has parted with the possession of the premises whereon it exists, it is necessary that he should derive some profit from its continuance, as by the receipt of rent,³ or that the property be conveyed with covenants for the continuance of the nuisance.⁴ An agreement between joint lessees of property that one of them shall keep the premises in repair is no defense to an action against the other for damages arising from non-repair.⁵ If when the owner parts with the possession and control of the property it was in good condition, he is not liable for the effect of a subsequent defect while in the lessee's possession.⁶ A lessee who has sublet premises in good repair at the time of such subletting can claim immunity, as well as the owner of the premises, from liability to respond in damages for the occurrence of an accident resulting from the defective condition of the premises during the possession of the sublessee, and that, too, although he (the original lessee) covenanted with the owner to keep the premises in repair.⁷ But if a lessee sublets premises out of repair, he will be held liable as if he were the owner or author of the nuisance.⁸

¹ *Knauss v. Brua*, 107 Pa. St. 85.

² *Kirby v. Boylston etc. Ass'n*, 14 Gray, 249; 74 Am. Dec. 682; *Readman v. Conway*, 126 Mass. 374.

³ *Rosewell v. Prior*, 12 Mod. 635.

⁴ *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 467; *Albany v. Cunliff*, 2 N. Y. 174; *Hanse v. Cowing*, 1 Lans. 288.

⁵ *Cannavan v. Conklin*, 1 Daly, 509.

⁶ *St. Louis v. Kaime*, 2 Mo. App. 66; *Ditchett v. R. R. Co.*, 67 N. Y. 425.

⁷ *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391.

⁸ *Davenport v. Ruckman*, 37 N. Y. 568.

A covenant in a lease that "no alteration or addition shall be made in or to the premises without the consent of the lessor" does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises.¹ If the owner has rented the premises with the knowledge that they are insufficient for the purpose for which they are designed to be used, or under the circumstances is properly chargeable with knowledge of this fact, he will be liable to persons injured thereon in consequence.² A landlord is under the same liability to the subtenants of the lessee for the safety and sufficiency of the demised premises for the purposes for which they are intended as he is to the lessee.³ An owner of a building who erects an awning thereon over a public street, or who allows an awning erected by a prior owner to remain, under a license so to do from the city authorities on condition that the same be securely fastened, is liable to any one who, without fault, is injured through the owner's neglect to keep the awning in repair. Such liability exists although at the time of the injury the building was occupied by a tenant.⁴ Where, by the neglect of a tenant, a water-pipe and gutter are stopped up and form ice, on which a pedestrian slips and is injured, the tenant is liable.⁵ So where by the negligence of the tenant in failing to secure a window sash it falls upon a passer-by, the tenant is liable.⁶ A tenant who, during his term, erects an insecure fence on the leased premises may be liable for an injury by its falling on a passer in the street after his surrender of the premises to the landlord.⁷

ILLUSTRATIONS. — Defendant leased premises to a tenant, who, by permission of the city, constructed a vault under the side-

¹ *Boston v. Worthington*, 10 Gray, 496; 71 Am. Dec. 678.

² *Burdick v. Cheadle*, 26 Ohio St. 397; 20 Am. Rep. 767; *Godley v. Hagerty*, 20 Pa. St. 387; 59 Am. Dec. 731; affirmed in *Carson v. Godley*, 26 Pa. St. 111; 67 Am. Dec. 404.

³ *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438.

⁴ *Jessen v. Sweigert*, 66 Cal. 182.

⁵ *Shindelbeck v. Moon*, 32 Ohio St. 264; 30 Am. Rep. 584.

⁶ *Odell v. Solomon*, 50 N. Y. Sup. Ct. 119.

⁷ *Hussey v. Ryan*, 64 Md. 426; 54 Am. Rep. 772.

walk in front, with a coal-hole, in a proper and usual manner. By the wrongful act of a stranger the stone supporting the cover of the hole was broken, and the cover turning when the plaintiff stepped on it, he fell and was injured. The defendant had no knowledge or notice of the defect. *Held*, that he was not liable: *Wolf v. Kilpatrick*, 101 N. Y. 146; 54 Am. Rep. 672. The owner of a building designed and adopted for public entertainments leased it to be used for an entertainment likely to crowd the building, the tenant agreeing to make such changes as he should see fit. A gallery was allowed to be overcrowded, and broke down. *Held*, that one injured by its fall could not maintain an action against the owner: *Edwards v. R. R. Co.*, 98 N. Y. 245; 50 Am. Rep. 659. A landlord leased to A a room which had open gas-pipes in it, and afterward leased a lower room to B, and gave B permission to introduce gas into the house. B introduced the gas. It escaped through the open pipes into A's room, exploded, and injured A. *Held*, that the landlord was liable: *Kimmell v. Burfeind*, 2 Daly, 155. The owner of a house, allowing a leader so to discharge upon the sidewalk that a mound of ice formed, upon which a woman slipped and fell. *Held*, liable, although the house was rented to a tenant whose duty it was to remove the ice: *Wenzler v. McCotter*, 22 Hun, 60. The owner of a building had maintained for eighteen years a coal-hole in the sidewalk without a right to do so. Plaintiff fell into it while the owner's lessee had it open for the purpose of getting in coal. *Held*, that the owner was liable: *Jennings v. Van Schaick*, 13 Daly, 438. The owners of a building excavated under the sidewalk and made a hole or scuttle in the sidewalk, with a proper cover thereto. They afterward leased the building. During the lease the scuttle got out of repair, and plaintiff, a passer-by on the sidewalk, was injured thereby. *Held*, that the owners were not liable: *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422. A, without authority from the city, raised the sidewalk several feet above the surface of the street and excavated under it, and placed in the sidewalk a grating, in front of the window in the building adjoining. He leased the adjacent premises to another party, and while the tenant was in possession, a person who was passing along the sidewalk slipped upon the grating, which gave way, and he was precipitated into the area below, and injured. *Held*, that A. was liable: *Stephani v. Brown*, 40 Ill. 428. Defendant, being the owner of a lot of ground, erected thereon a storehouse, and afterward leased the storeroom, and agreed with the lessee to construct therein cornices, shelvings, and fixtures, in a secure, safe, convenient, and proper manner for the sale of dry goods and groceries, and to keep the premises in good order. The fixtures put up under the agreement were unsafe and insecure

from the want of sufficient fastening to the walls of the building, all of which was known to the defendant, who, on request of the lessee, refused and neglected to repair. Afterward, and while the room and fixtures were in the possession of the lessee, the shelvings fell and injured the plaintiff, who was, at the time, in the storeroom as a customer of the lessee. *Held*, that defendant was not liable: *Burdick v. Cheadle*, 26 Ohio St. 393; 20 Am. Rep. 767.

§ 1155. Who are Occupiers—When Landlord Liable.

—Where parties, having agreed to become tenants, moved upon the premises before the execution of the lease, and then suffered a hoist-hole there to remain open, they were held to be occupiers sufficiently to invest them with the duty of guarding against defects in the premises.¹ Even where the premises are occupied by tenants, yet if the landlord comes on and either adopts the acts of the tenants in making repairs or superintends them, he may be liable for injury arising therefrom.² In an English case, during the term of a lease, but in the absence of the tenant, the landlord, under agreement with the tenant, entered the premises for the purpose of making extensive repairs, all of which the tenant was to pay for. The landlord was the sole judge as to what repairs were to be made, the tenant having left the premises nearly six months before the accident which gave rise to this suit. During the progress of the repairs the plaintiff fell down a cellar-door opening from these premises upon the highway, which had been left open by the carelessness of the landlord's servants. It was held that the defendant made these repairs, not as the agent of the tenant, but as landlord of the premises, for the reason that the repairs were under his direction, were of a substantial character, and as much for his as for the tenant's benefit.³ The fact that the owner occupied a house in connection with several of his tenants raises no presumption of negligence against

¹ *Hasley v. Taylor*, L. R. 1 Com. P. 53.

² *Scott v. Bay*, 3 Md. 431.

³ *Leslie v. Pounds*, 4 Taunt. 649.

him for an injury to a person resulting from the negligent use of a portion of the premises, which were properly constructed, and safe with ordinary usage.¹ The owner of a mine having demised the right to mine at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, etc., will be regarded as a landlord, and not liable for an injury resulting from the prosecution of the work by the tenant.² The defendant, as administrator of the estate of one of two mortgagees, was held to be not liable for the breaking away of a dam which was in the possession of third persons, although such possession was by virtue of a verbal agreement with the other mortgagee, whose entire interest in the dam was quitclaimed to the defendant previous to the accident, and although the accident was alleged to be due to the defective structure of the dam.³ But the owner of a building who is also occupant of part of it is liable for an injury resulting from his failure to keep in repair an awning extending the whole length of the building, although there be no agreement between him and the tenants of the residue of the building that he should keep the awning in repair.⁴ In case of an elevator in the hall-way of premises used by different tenants in common, and properly constructed and properly protected, the tenants on one floor are not liable for the negligent manner of use of the hatchway by the tenants on one of the other floors; and there being no affirmative proof showing specific acts of negligence on the part of any particular tenant, neither of the several tenants is liable, either severally or jointly with the others, for injuries resulting from such accidents.⁵ If the owner of a building puts an elevator into

¹ *Kaiser v. Heith*, 46 How. Pr. 161.

² *Offerman v. Starr*, 2 Pa. St. 394;
44 Am. Dec. 211.

³ *Oakham v. Holbrook*, 11 Cush.
299.

⁴ *Inhabitants of Milford v. Holbrook*, 9 Allen, 17; 85 Am. Dec. 735.

⁵ *Donnelly v. Jenkins*, 58 How. Pr.
252; 9 Daly, 41; *Harris v. Perry*, 23
Hun, 244; 89 N. Y. 308.

it for the convenience of his tenants, the machinery being under his control, he will be responsible for an injury received by a person lawfully using the elevator.¹ If the elevator works unevenly, so that bottles which one is sending up under the direction of the janitor of the building fall on his head while he is looking up, a finding that there is no contributory negligence will not be disturbed.² A landlord who lets tenements in a building to different tenants, with a right of way in common over a piazza at the rear, is bound to each tenant to keep the piazza clear of ice forming from water falling from a defective pipe from the roof.³ The owner of a building with a steep and unguarded roof, who lets it to a tenant, reserving only the right to enter the "premises to repair the same," is not liable to a person injured by a fall of snow from the roof while traveling with due care upon the adjoining highway, it not appearing that the tenant might not, by the use of reasonable care, have prevented the accident.⁴ A landlord is answerable where an opening in the sidewalk is left unguarded by a janitor in his employ, who has general charge of the premises and of such opening, though the building was rented to tenants in flats and apartments, and the janitor was also employed by them to deliver coal to their rooms.⁵

ILLUSTRATIONS. — OWNERS HELD LIABLE. — The plaintiff brought an action for injuries received by falling upon the sidewalk along defendants' premises, which was in an icy condition on account of the gutters of the building being of insufficient capacity to conduct the water from the roof, and the spout of such gutters discharging upon the sidewalk. All the separate parts of the building, consisting of cellars, stalls, and disconnected chambers, were leased, either at will or for a term of years, to many different tenants, yet the defendants had general supervision over the whole, and had the entire control of the

¹ *Stewart v. Harvard College*, 12 Allen, 58.

² *Ritterman v. Ropes*, 51 N. Y. Sup. Ct. 25.

³ *Watkins v. Goodall*, 138 Mass. 533.

⁴ *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47.

⁵ *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

outside doors and outside passage-ways, so far as was necessary to enable them to make all necessary repairs. Their superintendent kept the key of the building, but opened and closed the doors of it at fixed hours, according to the wishes of the tenants. *Held*, that there was no such occupancy by the tenants as would cast upon them the obligation to keep the building in repair, but the liability for injuries to third persons rested upon the owners: *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; 74 Am. Dec. 682. The roof of a building was so constructed as to cast snow and ice upon the highway, unless the same was seasonably removed. The whole building had been leased to tenants,—the lower floor and cellar to one tenant (reserving a scuttle-way), “all the chamber stories” to another (reserving certain rights). There was nothing in either lease which transferred any right to use or control the roof. Each lease required the tenant to keep the premises leased to him in repair, with the usual exceptions, but reserved to the lessors a right of entry to view and make repairs. *Held*, that the leases did not exclude the lessors from the roof, or relieve them from obligation, as owners, to remove whatever substances might accumulate there and become a nuisance to travelers upon the highway: *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318. An officer, for the purpose of making a lawful arrest, and at the request of the tenant of premises which the landlord was bound to keep in repair, entered them in the night-time and stepped into an open well, of which there was no indication, the well being in the natural and obvious approach. *Held*, that the officer could maintain an action against the landlord: *Learoyd v. Godfrey*, 138 Mass. 315. Defendant made a contract with C., by which C. was to operate defendant’s shingle-mill during the milling season, and manufacture certain brands of shingles from logs to be furnished by defendant, and receive payment therefor from defendant at fixed rates, and hire and pay the men employed, furnish tools and implements, repair breaks in machinery not costing over five dollars (larger breaks to be repaired at defendant’s expense), and load the shingles at his own expense (the defendant, however, to pay such expense beyond a certain figure until a side-track to the mill was completed). Defendant was to put the mill in running order, furnish the logs, and remove surplus and refuse timber. *Held*, that defendant was liable for any defective condition of the mill: *Whitney v. Clifford*, 46 Wis. 138; 32 Am. Rep. 703. A’s land, abutting on a public street, was sold to B under a power of sale mortgage. A remained in possession under an agreement to pay rent monthly. There was a visibly defective coal-hole in the sidewalk. *Held*, that B was liable to a passer-by who fell into the hole: *Dalay v. Savage*,

145 Mass. 38. The wife of a tenant in an apartment-house approached the elevator. The door was opened for her by a boy who had performed the same service on other occasions, but who was not shown to have been hired by the owner of the house. The woman stepped in and fell six feet, the platform having passed up. *Held*, that the owner was liable: *Tousey v. Roberts*, 53 N. Y. Sup. Ct. 446. A nuisance was created by a lessee under a lease by which he had covenanted to keep the premises in repair. This nuisance became injurious to a third person. Subsequently, and on the expiration of the lease, the lease was renewed with like covenants, the landlord not taking actual possession, but knowing of the injury. *Held*, that the landlord was liable for the injury: *Ingwersen v. Rankin*, 47 N. J. L. 18; 54 Am. Rep. 109. The owners of the upper stories of a store situated on a public street let them to a tenant, and an entrance directly in front of the stairs leading to the upper stories is so constructed and is so habitually kept open as to indicate that it is a proper entrance for those who have occasion to use the stairs, and there is a trap-door between it and the stairs, which they negligently and carelessly leave open. *Held*, that they are liable in damages to one having lawful occasion to use the stairs: *Elliott v. Pray*, 10 Allen, 378; 87 Am. Dec. 654.

ILLUSTRATIONS (CONTINUED).—OWNERS HELD NOT LIABLE.—The owner of a mine contracted, with others, to work it, and it was agreed that the contractors, and not the owner, should be responsible for injuries to workmen. It was also stipulated that when the contractors repaired the mine it should be done under the supervision of the owner's superintendent. The mine was in proper condition when the contractors took possession. A workman was killed by the falling of rock from the roof. *Held*, that the owners were not liable: *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 164; 43 Am. Rep. 456. A let to B three rooms in a house, with the privilege of using the flat roof of an extension to dry clothes. A child three years old came to see B, and went on the roof, and fell through a sky-light. *Held*, that the child had no right of action against A: *Miller v. Woodhead*, 104 N. Y. 471. On the iron frame of a Hyatt light set in a sidewalk to light the basement under it, worn smooth and slippery, a traveler fell, who recovered judgment against the city, which, in turn, sued the owner of the building, who had let the lower story and basement to one who had covenanted to keep the premises in repair. *Held*, that the action could not be maintained: *Boston v. Gray*, 144 Mass. 53. Defendant bought a house in September, subject to a lease to expire in May. In April, plaintiff was injured by a defective coal-hole in the sidewalk. Defendant had no knowledge of the defect. *Held*, that he was not liable for the injury: *Woram v. Noble*, 41 Hun, 398. Defendant

rented one floor of a building to L. for a laundry, and supplied him with motive power by a revolving shaft driven by steam. L. erected a partition near the shaft. The plaintiff in L.'s employ, endeavoring to pass between the partition and the shaft, was caught by the shaft and injured. *Held*, that he had no cause of action against defendant: *Ryan v. Wilson*, 87 N. Y. 471; 41 Am. Rep. 384. A lessee hired premises, to be restored at the end of the term to the condition that they were in at the beginning of it. The lessee made alterations, and an accident resulted to a third party by reason of the insecurity of a certain balcony. *Held*, that the landlord was not liable: *Bard v. R. R. Co.*, 10 Daly, 520. The owner of a building exercised due care in keeping locked the door leading to the elevator; but a tenant, who had the right to use the elevator, procured a key without the owner's knowledge, and left the door unlocked. A plumber, sent for by the tenant, opened the door and fell down the well. *Held*, that the owner was not liable: *Handyside v. Powers*, 145 Mass. 123. Defendant, for himself and other owners, leased a hall to a military company, who assumed the duty of repair, and not to underlet without consent of the defendant. Without such consent the company leased it for a skating-rink. The plaintiff in going to it fell into a hole in the floor of the passageway used for the hall and for other rooms in the same building occupied by other tenants, and was injured. The owners of the building all lived in another town, and none of them knew of the defect. *Held*, the defendant was not liable: *Cole v. McKey*, 66 Wis. 500; 57 Am. Rep. 293. A, the owner of three adjoining buildings, each containing an elevator operated by an engine in the rear of one of them, leased one to B, who agreed to pay the cost of keeping his elevator, which was exclusively used by him and his employees, in good condition and one third the cost of running the engine, which he did, notifying A from time to time of necessary repairs, until the lease was renewed with the same provisions, except that A agreed not to ask reimbursement for repairs. After this renewal, B's elevator-rope broke, A never having been notified that it needed repairs, though his engineer could have seen it when he oiled the machinery. *Held*, that A was not liable for the consequent injury, as the elevator was not in his possession or control, and the engineer's opportunity was not notice to him that it needed repairs: *Sinton v. Butler*, 40 Ohio St. 158. Defendant was sued for an injury sustained by plaintiff from the fall of a sign-board which persons were taking down from a building belonging to defendant. The case was destitute of proof that defendant had anything to do with removal of the sign, which belonged to an outgoing tenant. *Held*, that the action was not maintainable: *Sawyer v. Martins*, 25 Ill. App. 521.

ILLUSTRATIONS (CONTINUED).—OCCUPANTS HELD LIABLE.—D was tenant of the first floor and basement of a building, and C of the chambers. Each had a right to use a hoistway, which, when not in use, was closed by a trap, which, when down, made a continuous floor with the rest of the story. *Held*, that C had the right to use the trap as a floor when the hoistway was not in use, and that, under an agreement that the person using the hoistway should shut the trap-doors afterwards, C, who fell through the trap, left open by D, had a right of action, though his visit to the trap was to get a package that he had stored there: *Kent v. Todd*, 144 Mass. 478.

ILLUSTRATIONS (CONTINUED).—OCCUPANTS HELD NOT LIABLE.—A mill company owning land on the bank of a river constructed a canal by which it furnished water power to persons on both sides, to whom it rented mill sites, with a right of way across the canal. The canal was entirely covered over with a platform of wood, which had been used for ten years, to the company's knowledge, by all persons having business at those mills, for the purpose of passing and repassing. Among the tenants was M., who sublet, and whose tenant constructed that part of the platform opposite his premises. When the sublease expired, M. continued in possession under his lease. *Held*, that the duty of keeping the platform in repair, as to the public, devolved on the company, and not on M.: *Nash v. Minneapolis Mill Co.*, 24 Minn. 501; 31 Am. Rep. 349.

§ 1156. **Liability of Landlord to Tenant.**—As to the liability of landlord to tenant for the condition of premises, see *post*, Title Real Property—Landlord and Tenant.

§ 1157. **Excavation on One's Land near Highway.**—If one makes an excavation so near the line of the highway that one lawfully making use of the highway might accidentally fall into it, his duty is to erect guards as a protection against such accidents, and he will be responsible for injuries occasioned by his neglect to do so.¹ Where the excavation is on his own land, and not near the highway, he is not bound to guard it,² except as to persons

¹ *Barnes v. Ward*, 2 Car. & K. 661; 9 Com. B. 392; *Wettor v. Dunk*, 4 N. Y. 283; 23 Am. Rep. 175. *Fost. & F.* 298; *Hardcastle v. R. R. Co.*, 4 Hurl. & N. 67; *Vale v. Bliss*, 50 Barb. 358; *Davis v. Hill*, 41 N. H. 329; *Baltimore and Ohio R. R. Co. v. Boteler*, 38 Md. 568; *Stratton v. Staples*, 59 Me. 94; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175. ² *Bush v. Brainard*, 1 Cow. 78; 13 Am. Dec. 513; *Vale v. Bliss*, 50 Barb. 358; *Howland v. Vincent*, 10 Met. 373; 43 Am. Dec. 442; *Granlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep.

who are there by his invitation, express or implied.¹ The question is, Was the excavation sufficiently near the highway to be dangerous?² It has been held that a traveler may recover damages of the owner or occupier of premises who, without fault on his part, has fallen into a hole abutting the highway,³ or within fourteen inches of it;⁴ but where the excavation was twenty-four feet from the footway, there was no liability, although the intermediate space had become obliterated by persons traveling over it.⁵ So if a person by making an obstruction in the street leads a traveler to leave the highway, and fall into an excavation on the adjoining land, he will be liable.⁶ If an excavation has been made so near to a highway, since its dedication and adoption, as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties who have neglected to do so.⁷ One who maintains, between his field and a highway, a barbed-wire fence in such a manner as to be dangerous is liable for an injury to a horse lawfully at large in the highway.⁸

684; *Corby v. Hill*, 4 Com. B., N. S., 556; *Hounsell v. Smyth*, 7 Com. B., N. S., 731; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175.

¹ *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175.

² *Gramlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep. 684; *Hardcastle v. R. R. Co.*, 4 Hurl. & N. 74, the court saying: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or in case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see

where the liability is to stop. A man getting off the road on a dark night, and losing his way, may wander to any extent, and if the question be for the jury, no one can tell whether he is liable for the consequences of his act upon his own land or not. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise,—if in every case it were left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous."

³ *Barnes v. Ward*, 9 Com. B. 392.

⁴ *Hadley v. Taylor*, L. R. 1 Com. P. 53.

⁵ *Binks v. R. R. Co.*, 2 Best & S. 244.

⁶ *Doyle v. Mulrein*, 1 Sweeny, 517; 7 Abb. Pr., N. S., 258; *Vale v. Bliss*, 50 Barb. 358.

⁷ *Wettor v. Dunk*, 4 Fost. & F. 298.

⁸ *Sisk v. Crump*, 112 Ind. 504.

ILLUSTRATIONS.—Defendant had for a long time allowed a portion of his lands adjoining a street to be used by the public as a part of the highway. He afterwards made an excavation therein about ten feet from the outer line of the street, and plaintiff, while passing over the land in the dark, fell into the excavation, and was injured. There was no negligence on plaintiff's part. *Held*, that defendant was liable: *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175. A owned a factory standing about ten feet back from the line of the street pavement, and extending along the street about eighty feet. The space between the street line and the building had been so paved that there was nothing to indicate where the street line ended, and in front of the building A had erected a porch which came within six feet of the street line, and through which entrance to the building was effected. Alongside of the building, and adjoining the porch, was a deep and unfenced area. B, who was unacquainted with the surroundings, went to the factory after dark in search of her child, fell into the area, and was injured. *Held*, that A was liable: *Croghan v. Schiele*, 53 Conn. 186; 55 Am. Rep. 88. A was making an excavation by contract on the land of B, at a point some eighty feet from the street, and ten or fifteen feet above its grade. A third person having fallen into the excavation at night, and crying for help, C approached to help him, fell into the excavation, and was killed. *Held*, that A was not liable therefor: *Gramlich v. Wurst*, 86 Pa. St. 74; 27 Am. Rep. 684.

§ 1158. **Excavations in Public Street.**—One who makes an excavation in a public street, and leaves it unguarded, is liable to any person who, without fault, falls into it and is injured.¹ And this is so even where the excavation is by permission of the public authorities.² But an excavation in violation of law renders the maker

¹ *Sexton v. Zett*, 44 N. Y. 430; *Whalen v. Gloucester*, 4 Hun, 24; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Dygart v. Schenck*, 23 Wend. 446; 35 Am. Dec. 575; *Creed v. Hartman*, 29 N. Y. 591; 86 Am. Dec. 341; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84; *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Anderson v. Dickie*, 1 Rob. (N. Y.) 238; 26 How. Pr. 105; *Davenport v. Ruckman*, 37 N. Y. 568; 10 Bosw. 20; *Baxter v. Warner*, 6 Hun, 585; *Clifford v. Dam*, 19 Alb. L. J. 57; *Irvin*

v. Fowler, 5 Robt. 482; *Irwin v. Sprigg*, 6 Gill, 200; *Nelson v. Godfrey*, 12 Ill. 20; *South etc. R. R. Co. v. Chappell*, 61 Ala. 527.

² *Sexton v. Zett*, 44 N. Y. 430. A person who interferes in any way with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not; and irrespective of any permission from the public authorities to do the work from which the injury arises: *Sexton v. Zett*, 56 Barb. 119.

liable in any event.¹ The fact that he provided proper guards or coverings will not affect his liability, if they become unsafe or were insufficient at the time of the accident, such person being bound, at his peril, to keep the highway safe.² But an excavation is not a nuisance, and a license from the municipal authorities to legalize it is not requisite where it is an incidental encroachment on a street necessary in the improvement of the lot fronting upon it, and is properly made and guarded, and not continued an unreasonable length of time.³

§ 1159. Areas under Sidewalks.—Areas or excavations of like kind under sidewalks are not unlawful, and are not nuisances, if kept in repair and so as not to interrupt the proper use of the street.⁴ Where one duly licensed by the city authorities has removed a portion of a sidewalk to excavate for a vault, and has built a bridge over the excavation necessarily higher than the street, he is not bound to make the bridge as safe for travelers as the sidewalk was, but only reasonably safe.⁵ An unguarded opening in a sidewalk is a nuisance, though a license to make the opening may have been granted by the municipality.⁶ The owner is liable, however, for negligence in maintaining them.⁷ A lot-owner in a city constructing and maintaining a scuttle-hole in the sidewalk in front of his lot, and covering it so insecurely that a passer is injured, is liable to him therefor, whether the scuttle-hole was authorized by the city or not, and although the tenant had agreed to keep the scuttle closed.⁸ It is the duty of the occupier of a house having an area

¹ *Owings v. Jones*, 9 Md. 108.

² *Congreve v. Morgan*, 18 N. Y. 84; 72 Am. Dec. 495.

³ *Clark v. Fry*, 8 Ohio St. 358; 72 Am. Dec. 590.

⁴ *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422; *Irvin v. Fowler*, 5 Robt. 482; *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55.

⁵ *Nolan v. King*, 97 N. Y. 565; 49 Am. Rep. 561.

⁶ *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

⁷ *Beardsley v. Swann*, 4 McLean, 333; *Bush v. Johnston*, 23 Pa. St. 209.

⁸ *Calder v. Smalley*, 66 Iowa, 219; 55 Am. Rep. 270.

fronting a public street so to fence it as to make it safe to passers-by; and it is no defense to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened.¹ Where an area or cellar-way in the sidewalk is dangerous, it is no defense that similar areas or cellar-ways are common in the city, and are customarily protected as the one in question was, or that over ten thousand persons had passed and repassed the area every year since it had been built, without accident.² Where the injury happens on a sidewalk in a large city, it is no defense that there is a safe and convenient sidewalk outside of the dangerous area or defect; as where a window extended into the sidewalk only fourteen inches, and the walk was six and one half feet wide.³ It is immaterial whether the injury happened through the area being rendered dangerous by the owner or by his contractor, his tenant, or other wrong-doer. If, however, there is no question as to the area being wrongful *per se*, then, it seems, the owner or occupier of the premises will not be liable for an injury happening in consequence of its having been opened by the act of a wrong-doer, he himself having properly secured it. But if, after the removal, by a trespasser or other independent person, of the cover of such a lawful area, the owner of the premises suffers it to remain open until a reasonable time has elapsed in which a prudent man should have discovered its open condition, then he will be liable for a subsequent injury by it to a traveler.⁴

ILLUSTRATIONS. — Plaintiff fell through an open hole in the sidewalk in front of defendant's premises. The hole was kept

¹ *Coupland v. Hardingham*, 3 Camp. 398; *Irwin v. Sprigg*, 6 Gill, 200; 46 Am. Dec. 667; *Buesching v. Gas Company*, 73 Mo. 219; 39 Am. Rep. 503.

² *Temperance Hall Association v. Giles*, 33 N. J. L. 260.

³ *Bacon v. Boston*, 3 Cush. 174; *Stephani v. Brown*, 40 Ill. 423.

⁴ 1 Thompson on Negligence, 1251.

closed generally by a wooden trap-door. Plaintiff was not looking. *Held*, that defendant was liable for the injuries sustained by plaintiff: *Barry v. Terkildsen*, 72 Cal. 254.

§ 1160. **Objects Falling upon Travelers.**—Where a person places anything over the highway which may come down and injure passers-by he is held to a strict watchfulness to see that it causes no injury.¹ One is liable for the act of his servant in throwing a keg out of the window of his house upon a passer-by, even though the walk is a private one, and he would not be liable to him for an injury from a defect in it.² In an English case the defendant had a lamp and lamp-iron projecting from his premises over the street, and had given orders to a competent contractor to repair it, but the contractor had done the work badly, by reason of which the lamp fell and injured the plaintiff. It was held that the defendant was liable.³ If the object is placed where it is in violation of law, the party becomes an insurer; as where a swinging sign was placed by the defendant over a sidewalk contrary to a city ordinance, and an extraordinary gale of wind blew it down, he was held responsible for the result.⁴ The owner of a building, to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passer-by, may be liable for the damage so caused. But if he pays the damage, he has an action against the company for indemnity.⁵ Where persons are building or making repairs near or over the sidewalk of a public street, they must use a proper degree of care to avoid injuring passers-by.⁶ They must use safeguards to prevent tools, or timber, or bricks,

¹ *Tarry v. Ashton*, 1 Q. B. Div. 314.

² *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; 96 Am. Dec. 685.

³ *Tarry v. Ashton*, 1 Q. B. Div. 314.

⁴ *Salisbury v. Herchenroder*, 106 Mass. 58; 8 Am. Rep. 354.

⁵ *Gray v. Boston Gas-light Co.*, 114 Mass. 149; 19 Am. Rep. 324.

⁶ *Clare v. Bank*, 1 Sweeney, 539; 3 Jones & S. 26; 8 Jones & S. 104; Hunt v. Hoyt, 20 Ill. 544.

or the like, from falling,¹ or warn passers-by of the danger, by notices, or in other ways.² The fact that an object falls and injures a traveler is *per se* evidence of negligence.³ The owner of a building adjoining a street or highway being under a legal obligation to take reasonable care that it shall not fall into the street or highway and injure persons lawfully there, in case of injury so caused, it is incumbent upon the owner to show that he has exercised reasonable care, and the absence of such care may be presumed from the fact of the injury.⁴ It is not negligence to remove a barricade after all the outside work of a house is completed. Nor is it the duty of a contractor to guard against accidents which cannot be reasonably foreseen; as to put up screens at the windows of a house to prevent the tools of the employees of a subcontractor, who has engaged to do the plastering, from falling out of the windows. And where, under such circumstances, a passer-by was injured by a "straight-edge" of a plasterer falling out of the window, the principal contractor was held not liable.⁵ Where the owner of a house has constructed it in a faulty manner, or suffered it to get out of repair so that it is dangerous to the passers-by on the street, it is a nuisance, and any person injured thereby may recover damages therefor.⁶ Where a city by

¹ Hunt v. Hoyt, 20 Ill. 544; Jager v. Adams, 123 Mass. 26; 25 Am. Rep. 7.

² Vanderpool v. Hussen, 28 Barb. 196; Jackson v. Schmidt, 14 La. Ann. 806.

³ Byrne v. Boadle, 2 Hurl. & C. 722; Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530; Clare v. Bank, 1 Sweeny, 539; 3 Jones & S. 26; 8 Jones & S. 104. In an action for an injury caused by the falling of tiles negligently piled, it appearing that they were in the control and custody of defendant, held, not necessary to prove that they were owned by defendant: Palmer v. St. Albans, 56 Vt. 519.

⁴ Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530.

⁵ Pearson v. Cox, 2 Com. P. Div. 369.

⁶ Vincett v. Cook, 4 Hun, 318; Rector of Church of Ascension v. Buckhart, 3 Hill, 193; Regina v. Watts, 1 Salk. 357; Eakin v. Brown, 1 E. D. Smith, 36; Mullen v. St. John, 57 N. Y. 567; 15 Am. Rep. 530; Lowell v. Spaulding, 4 Cush. 277; 50 Am. Dec. 775; Oakham v. Holbrook, 11 Cush. 299; Deford v. State, 30 Md. 179; Whalen v. Gloucester, 4 Hun, 24; Milford v. Holbrook, 9 Allen, 17; 85 Am. Dec. 735; Shipley v. Fifty Associates, 101 Mass. 251; 3 Am. Rep. 346; Hadley v. Taylor, L. R. 1 Com. P. 53; Kearney v. R. R. Co., L. R. 6 Q. B. 759; Welfare v. R. R. Co., L. R. 4 Q. B. 693.

authority of its charter maintains shade-trees on the sidewalks, the owner or occupant of a lot is not impliedly bound to trim them, nor liable for injury to a passer-by from the fall of a neglected rotten limb.¹

ILLUSTRATIONS.—A cotton-bale, temporarily set up on a sidewalk, awaiting deposit in a warehouse, fell upon and injured a person. *Held*, the warehouseman was liable: *Maddox v. Cunningham*, 68 Ga. 431; 45 Am. Rep. 500. A mechanic employed to put up signs on the second story of a building, on a thoroughfare in a populous city, made use, for that purpose, in a windy day, of a swinging stage that had no rim or other preventive of the sliding off of tools. A hammer fell on the head of a woman passing on the sidewalk underneath. *Held*, that the mechanic was guilty of gross negligence: *Hunt v. Hoyt*, 20 Ill. 544. A foot-passenger on a city street sat for a moment on the door-sill of a house fronting on the street to tie his shoe, and there was injured by a brick falling from the dilapidated wall of the house upon his head, which was within the street lines. *Held*, that the owner of the house was liable: *Murray v. McShane*, 52 Md. 217; 36 Am. Rep. 367. The owner of adjoining houses with an alley between them leading to a factory suffers the wall of a privy abutting upon the alley to be in bad repair, and the minor child of the tenant of one of the houses, while on his way to the factory for his own amusement, was injured by the wall falling upon him. *Held*, that the owner was liable: *Schilling v. Abernethy*, 112 Pa. St. 437; 56 Am. Rep. 320. Plaintiff, an eleven-year-old girl, was injured by a falling brick, as she was walking on the sidewalk by a house which defendants were tearing down. Defendants had placed a barrier across the sidewalk, leaving an opening sufficient for a grown person to enter and pass by the house. Plaintiff went around the barrier, walking in the gutter, and then stepped back upon the sidewalk, when the injury occurred. *Held*, that it was for the jury to say whether the accident resulted from defendant's negligence in not providing a proper barrier, or plaintiff's negligence in disregarding the one provided: *Mauerman v. Siemerts*, 71 Mo. 101. Plaintiff while walking on a sidewalk in front of a building which the defendant was erecting was struck and injured by a brick falling therefrom; there were no barriers to prevent the approach of foot-passengers. *Held*, that the defendant might be liable for the injury on account of the omission to construct barriers, although there was no negligence in suffering the brick to fall: *Jager v. Adams*, 123 Mass. 26; 25 Am. Rep. 7. Defendant's building and one on an adjoining lot,

¹ *Weller v. McCormick*, 47 N. J. L. 397; 54 Am. Rep. 175.

the side walls of which were very near each other, were destroyed by fire, leaving the walls partly standing, with rubbish heaped up to the top of each. Six months afterward, while the plaintiff was removing the wall on the adjoining lot, the defendant's wall fell, injuring him. In the absence of evidence that defendant's wall was dangerous, or would have fallen before the fire or before the removal of the other wall, or that defendant knew or was notified of that removal, or that it was contemplated, *held*, that an action for such injury could not be maintained: *Mahoney v. Libbey*, 123 Mass. 20; 25 Am. Rep. 6.

§ 1161. Snow and Ice on Roofs—On Sidewalks.—

One who suffers snow and ice to accumulate on the roof of his house, and to remain there for an unreasonable length of time after notice of it, is liable if the mass slides off and injures a passer-by.¹ If one fixes a spout or cornice which gathers water that falls upon his roof, and throws it upon his neighbor's land,² or upon the sidewalk, so that ice forms there, and a traveler is injured, an action lies.³ Where there is a statute making a building so erected that its roof overhangs the street an indictable nuisance, and the injury is the direct consequence of the roof being so constructed, then negligence need not be averred or proved.⁴ So where the roof of a building is so constructed as to cast snow and ice into the street, it is *per se* a nuisance, and the owner is liable for any injury produced thereby.⁵ The owners and occupiers of premises abutting a street in a city are not responsible to individuals for injuries resulting from a failure to remove from the sidewalk accumulations of snow and ice created by natural causes,⁶ although there is a valid ordi-

¹ *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318; *Garland v. Towne*, 55 N. H. 55. As to the liability of the owner where the building is leased, see *Leonard v. Storer*, 115 Mass. 86; 15 Am. Rep. 76.

² *Reynolds v. Clarke*, 2 Ld. Raym. 1399; 1 Strange, 634; *Fay v. Prentice*, 1 Com. B. 828; *Bellows v. Sackett*, 15 Barb. 96.

³ *Kirby v. Boylston etc. Ass'n*, 14 Gray, 249; 74 Am. Dec. 682.

⁴ *Garland v. Towne*, 55 N. H. 55.

⁵ *Walsh v. Mead*, 8 Hun, 389; *Shipley v. Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; 106 Mass. 194; 8 Am. Rep. 318.

⁶ *Moore v. Gadsden*, 87 N. Y. 84; 41 Am. Rep. 352.

nance requiring them to remove such accumulations. The only liability is to pay the penalty prescribed by the ordinance.¹ The liability to pay damages rests on the municipal corporation charged with the repair of streets.²

ILLUSTRATIONS.—A city charter required lot-owners to keep the sidewalk “in a good and safe condition for use,” and made them liable for injuries to any person by “reason of a defective sidewalk.” The sidewalk in front of defendants’ premises had become smooth and slippery by long use, and some third person, with their knowledge, had painted it, thus increasing its slipperiness. The plaintiff slipped and fell on it, sustaining injury. *Held*, that defendants were liable: *Morton v. Smith*, 48 Wis. 265; 33 Am. Rep. 811.

§ 1162. **Telegraph-wires in Streets.** — A telegraph company which allows its wire to hang so low as to interfere with a vehicle and cause damage is liable.³ And a wire found in such a condition is evidence of negligence.⁴ A telegraph-wire carried from one pole to another is not a dangerous object *per se*.⁵ And where a telegraph-pole was broken by a storm, injuring the plaintiff, the company was held not liable. The court said that the company was bound to use reasonable care in the construction and maintenance of its line, and if it appeared that the post was originally not reasonably sufficient, or carelessly permitted to become insufficient by decay, then responsibility attached. But the company was not absolutely bound to have its posts in the streets so strong and secure that they could not be blown down or broken by any storm, nor bound to insure the safety of passengers in the streets from injuries resulting from the falling thereof. The evidence showed that the acci-

¹ Kirby v. Boylston etc. Ass’n, 14 Gray, 249; 74 Am. Dec. 682; Flynn v. Canton Co., 40 Md. 312; 17 Am. Rep. 603; Moore v. Gadsden, 93 N. Y. 12; Fuchs v. Schmidt, 8 Daly, 317; Taylor v. R. R. Co., 45 Mich. 74; 40 Am. Rep. 457.

² See *post*, Division V., Municipal Corporations.

³ Dickey v. Maine Tel. Co., 46 Me. 483; West. Union Tel. Co. v. Eyser, 91 U. S. 495.

⁴ Thomas v. W. U. Tel. Co., 100 Mass. 156.

⁵ Wabash etc. R. R. Co. v. Locke, 112 Ind. 404; 2 Am. St. Rep. 193.

dent was occasioned by a snow-storm of unusual severity, and that the line was sufficient for storms reasonably expected; and the charge that defendant was not bound so to make or manage its line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected, which the lower court refused to give, was affirmed as correct.¹

ILLUSTRATIONS. — Telephone-wires erected by a company acting under a license to erect and maintain wires became encumbered with ice while the fire department were engaged in putting out a fire, and fell into the street, where plaintiff, while in the exercise of due care, stumbled over them and was injured. *Held*, that if the company failed to remove the wires within a reasonable time after notice of their fall, it was liable: *Nichols v. Minneapolis*, 33 Minn. 430; 53 Am. Rep. 56.

§ 1163. **Objects Frightening Horses.**—A person who negligently or unlawfully places or leaves in the highway an object which, from its appearance, is likely to frighten a horse of ordinary training and docility is liable to a traveler for any damage which is the proximate result of his horse taking fright at such object.² The plaintiff has recovered damages where the objects frightening the horse were the following: A pile of buffalo-hides on the defendant's own land;³ the beating of a drum in the highway;⁴ a dog barking at the horse;⁵ a derrick employed by a railroad in handling freight;⁶ tubing and other machinery being transported for the use of a water-works;⁷ a steam-whistle in a mill;⁸ a pile of stones collected in the high-

¹ *Ward v. Tel. Co.*, 71 N. Y. 81; 27 Am. Rep. 10.

² *Clinton v. Howard*, 42 Conn. 294; *Jones v. R. R. Co.*, 107 Mass. 261; *Judd v. Fargo*, 107 Mass. 264; *Klipper v. Coffey*, 44 Md. 117; *Watkins v. Reddin*, 2 Fost. & F. 629; *Hill v. New River Co.*, 9 Best & S. 303; *Flower v. Adam*, 2 Taunt. 314; *Lake v. Millikin*, 62 Me. 240; 16 Am. Rep. 456; *Harris v. Mobbs*, 27 Week. Rep. 154; *House v. Metcalf*, 27 Conn. 631; *Bennett v.*

Lovell, 12 R. I. 166; 34 Am. Rep. 628.

³ *Lobenstein v. McGraw*, 11 Kan. 645.

⁴ *Louby v. Hafner*, 1 Strob. 185.

⁵ *Schmid v. Humphrey*, 48 Iowa, 652; 30 Am. Rep. 414.

⁶ *Jones v. R. R. Co.*, 107 Mass. 261.

⁷ *Bennett v. Lovell*, 12 R. I. 166; 34 Am. Rep. 628.

⁸ *Knight v. Goodyear etc. Mfg. Co.*, 33 Conn. 438; 9 Am. Rep. 406.

way;¹ a jet of water spouting up out of the ground in a public highway, about four feet high;² a traction steam-engine driven along the highway at the rate of six miles an hour.³ But not a pile of building materials placed of necessity on the side of the highway.⁴ A railroad company is not liable for leaving its cars standing on a side-track, loaded with slabs of wood in the usual way, and for leaving a hand-car bottom side up, according to the usual custom, although it may thereby produce a "scarecrow" with "a horrid and frightful appearance," frightening a traveler's horse and injuring the traveler.⁵ One who carelessly sprinkles a pavement where wild horses are hitched, and so frightens them, and causes them to run down the street and injure a pedestrian, is guilty of negligence and liable for the injury.⁶ The question frequently is, Has the defendant impeded the highway an unreasonable length of time?⁷

ILLUSTRATIONS. — A land-owner engaged in whitewashing a fence skirting a highway running through his land used a small barrel mounted on wheels. This, with a shovel projecting slightly above the top, was left at the side of the highway over Sunday. The plaintiff's horse took fright at it and caused personal injuries to him. *Held*, that the defendant was not liable unless the vehicle was so unusual and extraordinary as to have a natural tendency to frighten horses of ordinary gentleness and training, and was left by the roadside an unreasonable length of time: *Piollet v. Simmers*, 106 Pa. St. 95; 51 Am. Rep. 496. Plaintiff's minor daughter, with a suitable horse and vehicle, and in the exercise of ordinary care, was traveling along a public highway, when the horse became frightened at the appearance of the defendant's hog, which was permitted to be in the highway without a keeper, and occasioned an injury to the daughter and the vehicle. *Held*, that the defendant was liable for the injury, whether he knew or not that the hog was there at the time: *Jewett v. Gage*, 55 Me. 538; 92 Am. Dec. 615.

¹ *Clinton v. Howard*, 42 Conn. 294.

⁵ *Atchison etc. R. R. Co. v. Loree*,

² *Hill v. New River Co.*, 9 Best & S. 303.

⁴ *Neb.* 446.

³ *Watkins v. Reddin*, 2 Fost. & F. 629.

⁶ *Forney v. Geldmacher*, 75 Mo. 113; 42 Am. Rep. 388.

⁷ *Judd v. Fargo*, 107 Mass. 264.

⁴ *Mallory v. Griffey*, 85 Pa. St. 275.

Plaintiff, while driving along a highway, was injured by reason of his horse taking fright at an engine mounted on wheels, which defendant was moving along the same highway by means of steam-power. In an action for damages, the court charged the jury that "a party placing upon the highway any vehicle unusual, and calculated, from its appearance and mode of locomotion, to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom." *Held*, error: *Macomber v. Nichols*, 34 Mich. 212; 22 Am. Rep. 522. A turnpike company, exacting toll for public travel on its road, negligently suffered the same to become, and to its knowledge to remain a long time, out of repair, by means of a large hole near the center of the track. The plaintiff riding on horseback on said road, having no knowledge of the defect, and being in no way negligent, her horse became frightened by the hole, shied, threw her to the ground, and injured her. *Held*, that she might recover damages from the company therefor without alleging that the horse came in contact with the hole, or that there was not room to pass on either side: *Brooksville etc. Turnpike Co. v. Pumphrey*, 59 Ind. 78; 26 Am. Rep. 76.

§ 1164. **Permissible Obstructions in Streets—Building Materials.**—An adjoining owner may place building materials on a portion of the highway and allow them to remain there a reasonable length of time, where it is necessary to do so in order to enable him to erect a building on the line of the highway.¹ The streets of a town may be used for the temporary deposit of goods in their transit to the storehouse or for wharfage, regard being paid to their evident object and purpose.² The owner of a warehouse located on a street through which the railroad runs has the right to unload goods from a car standing on the track, by means of skids extending from the car to the warehouse, provided there is ample room to accommodate travel on the other side of the street, and the time occupied in unloading is reasonably short. So the right of a railroad corporation to stop its cars in the street and unload them, in a reasonable time

¹ *Mallory v. Griffey*, 85 Pa. St. 275; *hausen v. Pond*, 36 Wis. 29; *O'Linda Palmer v. Silverthorn*, 32 Pa. St. 65; *v. Lothrop*, 21 Pick. 292, 297.
² *People v. Cunningham*, 1 Denio, 524; *Haight v. Keokuk*, 4 Iowa, 199; 43 Am. Dec. 709; *Wood v. Mears*, *Jochem v. Robinson*, 72 Wis. 199.
 12 Ind. 515; 74 Am. Dec. 222; *Hund-*

and manner, is incidental to the right of transit.¹ It is not negligence *per se* for the driver of a wagon to back it across the sidewalk in order to unload sacks of salt into a building.² Whether a particular obstruction of a highway is reasonable or not is a question of fact.³ Where

¹ Mathews v. Kelsey, 58 Me. 56; 4 Am. Rep. 248.

² Hand v. Klinker, 54 N. Y. Sup. Ct. 433.

³ Attorney-General v. Sheffield Gas Co., 19 Eng. L. & Eq., 639; Graves v. Shattuck, 35 N. H. 257; 69 Am. Dec. 536; Hundhausen v. Bond, 36 Wis. 29; Stratton v. Staples, 59 Me. 94; Com. v. Passmore, 1 Serg. & R. 219, the court saying: "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood and stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So because building is necessary, stones, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it." In a leading English case (Attorney-General v. Sheffield Gas Co., 19 Eng. L. & Eq.), the chancellor said: "If I were to station a cart in a street, opposite my door, obstructing the public highway, I might be guilty of a nuisance, for aught I know, and I might be liable to be indicted; but it would be a sufficient answer to say that the cart was there only a reasonable time, and for a lawful purpose. If it is used in the way such things are ordinarily used, it cannot be a nuisance so to use it. The public highway is for the convenience of mankind, and so to use it cannot be a nuisance. One of the uses is, that a person traveling with a cart or carriage may draw

up at a particular door and get down, according to his lawful occupation. So, again, if I have a cart come to my house with five or six tons of coal, of course it would be some time obstructing the public highway; but it is difficult to maintain that in an ordinary street that would be a nuisance. All these cases of nuisance or no nuisance, arising from particular acts, must, from the nature of things, be governed by particular circumstances. Now, if a carriage were to drive up in Belgrave Square and stand half a day at the door of a house, waiting for some person calling there, I do not think that that could be made out to be a nuisance. It may be said, 'You staid there an unreasonable time.' It may be so, but it would be difficult indeed to make out that that was a nuisance. But suppose the same thing happened in the street that runs from Covent Garden to St. Martin's Lane; a man calling there and saying, 'I mean to have a chat for half an hour,' I do not know that that would not be a nuisance. You must be guided by the particular circumstances; you must look at the particular place or object that the parties have in view. I take it, that all these questions are of this nature: Are you using the matter which is the subject-matter of inquiry in a reasonable way? and are those the uses for which it was contemplated?" "Very much depends upon the locality, the width of the highway, and the time it may be obstructed by the alleged nuisance. What would be a reasonably free passage for the public, what would be a reasonably safe and convenient road for the accommodation of the public travel, in a remote, sparsely populated rural district, might and generally would not be so in a compact city or a large and populous village. So, too, in a village or city, what would be no obstruction in a broad street little frequented might be very objectionable, if not an abso-

the use of the highway is regulated by ordinance, one following the directions of the ordinance is not liable for any damages caused by the obstruction,¹ while one violating the ordinance will be.² Persons making use of a highway for games or sports dangerous to travelers are liable for all damages occasioned thereby. They are liable as joint trespassers for an injury done by one of them in accidentally striking a traveler with the ball in the course of the game, where the highway is so narrow as to make the playing of such games there dangerous to travelers.³

ILLUSTRATIONS.—Defendants, occupants of a store, placed skids reaching from the door across the sidewalk to a vehicle in the street for the purpose of loading kegs of merchandise containing about five gallons each, and each weighing less than fifty pounds. The plaintiff, lawfully walking upon the sidewalk, in trying to cross the skids, fell and was injured. *Held*, that the questions of negligence and contributory negligence were for the jury, and a demurrer was erroneously sustained: *Jochem v. Robinson*, 66 Wis. 638; 57 Am. Rep. 298. Defendant, for the purpose of removing merchandise from his store in the city of New York, laid skids from a truck across the sidewalk to the steps. They had been there a few minutes, when the plaintiff, coming along the sidewalk, attempted to pass around the skids by the steps, and slipped upon the steps and was injured. *Held*, that defendant was not bound to see that the steps were in an absolutely safe condition for travel, and that the plaintiff was not entitled to recover: *Welsh v. Wilson*, 101 N. Y. 254; 54 Am. Rep. 698.⁴

lute nuisance, in a narrow business thoroughfare": *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536.

¹ *Wood v. Mears*, 12 Ind. 515.

² *Weick v. Lander*, 75 Ill. 93.

³ *Vosburgh v. Moak*, 1 Cush. 453; 48 Am. Dec. 613.

⁴ *Earl, J.*, saying: "The defendant had the right to place the skids across the sidewalk temporarily, for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right, to be exercised in a reasonable manner, so as not to unnecessarily encumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway she had the option either to wait a couple

of minutes or to cross the street and pass upon the other sidewalk, or to pass around the truck in the street, or to take the way she selected. The defendant was under no obligation to furnish her a safe passage-way around the obstruction: *People v. Cunningham*, 1 Denio, 530; *Commonwealth v. Passmore*, 1 Serg. & R. 219; *People v. Horton*, 64 N. Y. 610. The defendant owed the plaintiff no duty to see that its steps were in an absolutely safe condition for travel, and it does not appear that they were dangerous under such circumstances as to charge him with carelessness, even if that would have been sufficient to impose any liability upon him in this case."

CHAPTER LX.

INJURIES ON HIGHWAYS.

- § 1165. Injuries while driving on the highway — Liability in general.
 § 1166. Law of the road — Keeping to the right.
 § 1167. Pedestrian and vehicle — Horsemen.
 § 1168. Collisions with runaway horses.
 § 1169. Contributory negligence on highways — Duty to look for defects and dangers.
 § 1170. What is and what is not proper use of highway by traveler.
 § 1171. Rate of speed — Manner of driving.
 § 1172. At night.
 § 1173. Skittish or scared horse — Defective vehicle or harness.
 § 1174. When plaintiff has knowledge of defect.

§ 1165. **Injuries while Driving on the Highway — Liability in General.** — A traveler on the highway is liable for any injury which he may cause to another by want of care on his part; i. e., want of such care as ordinarily prudent and skillful men would use under the same circumstances.¹ Great care, it is said, should be used in driving a carriage through a crowded street.² From the mere happening of an accident between travelers on the highway, no presumption of negligence on the part of either arises; the plaintiff must therefore prove that the defendant was negligent,³ and that his own carelessness did not contribute to the injury.⁴ The question of negligence is a question for the jury.⁵ But the judge will not

¹ *Hawkins v. Riley*, 17 B. Mon. 101; *Center v. Finney*, 17 Barb. 94, *Selden's Notes*, 80; *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694; *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768; *Lane v. Bryant*, 9 Gray, 245; 69 Am. Dec. 283. And the same rule applies to a traveler on a private way: *Danforth v. Durell*, 8 Allen, 242.

² *Vaughn v. Scade*, 30 Mo. 600.

³ *Cotton v. Wood*, 8 Com. B., N. S., 568; *Lane v. Crombie*, 12 Pick. 177; *Parker v. Adams*, 12 Met. 415; 46

Am. Dec. 694; *Schmidt v. Harkness*, 3 Mo. App. 385.

⁴ *Dressler v. Davis*, 7 Wis. 527; *Lane v. Crombie*, 12 Pick. 177.

⁵ *Schienenfeldt v. Norris*, 115 Mass. 17; *Templeman v. Haydon*, 12 Com. B. 507; *Sheehan v. Edgar*, 58 N. Y. 631; *Vincent v. Stinehour*, 7 Vt. 62; 29 Am. Dec. 145; *Wakeman v. Robinson*, 1 Bing. 213; 8 J. B. Moore, 63; *Brooks v. Schwerin*, 54 N. Y. 343; *Munroe v. Leach*, 7 Met. 274.

be justified in leaving the case to them where the plaintiff's evidence is equally consistent with the absence as with the presence of negligence in the defendant.¹ It is proper to tell them that if they believe, from the evidence, that the injury was caused by the negligence or fault of the defendant driver, without any greater want of care or skill on the part of the plaintiff driver than could reasonably be expected of a person of ordinary prudence and skill in such a situation, the plaintiff is entitled to recover.² It is not negligence *per se* to drive a team at a "lively trot" in the streets of a city. One so driving is not limited to any particular rate of speed, but is bound simply to use proper care not to injure other persons lawfully upon the streets.³ If damages are inflicted by reason of the breaking of the carriage or harness of a traveler on the highway, the traveler or owner of the harness or vehicle is liable only on the principle of want of ordinary care. It must be shown by the plaintiff that he knew, or might with reasonable diligence have known, of the defect, and was negligent in not repairing it.⁴ The mere fact that a wheel comes off, or that an axle-tree breaks, is not negligence *per se*.⁵

The fact that the plaintiff was at the time of the accident violating the law will not prevent him from recovering if the defendant could nevertheless have avoided the injury by the exercise of ordinary care;⁶ as, for instance, where he was driving at an unlawful rate of speed;⁷ or without the number of bells required by a statute;⁸ or racing for a wager;⁹ or traveling on Sunday;¹⁰ or suffering his vehicle to stand crosswise of the road for the purpose

¹ Cotton v. Wood, 8 Com. B., N. S., 568.

² Comsen v. Ely, 37 Ill. 338.

³ Crocker v. Ice Co., 92 N. Y. 652.

⁴ 1 Thompson on Negligence, 381; Doyle v. Wragg, 1 Fost. & F. 7.

See Welch v. Lawrence, 2 Chit. 262.
⁵ Doyle v. Wragg, 1 Fost. & F. 7.

⁶ Welch v. Wesson, 6 Gray, 505; Morton v. Gloster, 46 Me. 520.

⁷ Hall v. Ripley, 119 Mass. 135.

⁸ Counter v. Couch, 8 Met. 436; Kidder v. Dunstable, 11 Gray, 342.

⁹ Welch v. Wesson, 6 Gray, 505.

¹⁰ Schmid v. Humphrey, 48 Iowa, 652.

of unloading;¹ or stopping in his pung in a traveled street, waiting for two of his acquaintances to swap horses;² or suffering his ass to go fettered in the highway;³ or leaving his horse standing in the highway.⁴

ILLUSTRATIONS.—A driver was negligent in not having a “skid” or brake to check his wagon when going down hill, and in looking at his horses so that he did not see the deceased until he was within three yards of him. The deceased was guilty of some negligence in attempting to cross the road where there was no regular crossing. *Held*, that his representative was entitled to recover if the defendant could nevertheless have avoided the accident by the exercise of reasonable care: *Springett v. Ball*, 4 Fost. & F. 472.

§ 1166. Law of the Road—Keeping to the Right.—

By the law of the road, a traveler in any vehicle in passing another coming towards him must keep to the right.⁵ Failing to keep to the right is evidence of negligence on his part in case of a collision,⁶ but it does not make the party absolutely liable, as circumstances may make it necessary to drive to the left, instead of to the right.⁷ Where two persons meet traveling in their wagons upon the highway, and a collision takes place, and one of them is thrown from his wagon and injured, in order that the person injured may maintain an action for the damages sustained by him, the injury must not have been caused by any want of ordinary care on his part to avoid it, although he was traveling in the manner prescribed by the statute, and

¹ *Steele v. Burkhardt*, 104 Mass. 59; 6 Am. Rep. 191. *Contra*, *Stiles v. Geesey*, 7 Pa. St. 439.

² *Bigelow v. Reed*, 51 Me. 325.

³ *Davies v. Mann*, 10 Mees. & W 546.

⁴ *Streett v. Laumier*, 34 Mo. 469.

⁵ *Wilson v. Rockland Mfg. Co.*, 2 Harr. (Del.) 67; *McLane v. Sharpe*, 2 Harr. (Del.) 481. This common-law rule is adopted by statute in some states: See Mass. Rev. Stats., c. 51, sec. 1; Mich. Comp. Laws, 1871, sec. 2002; *Palmer v. Barker*, 11 Me. 338; 1 N. Y. Rev. Stats., 695, sec. 1; *Fales*

v. Dearborn, 1 Pick. 344. As to the rule when both are going in the same direction, it has been held that proof of custom is not admissible: *Bolton v. Colder*, 1 Watts, 360.

⁶ *Jones v. Andover*, 10 Allen, 20; *Goodhue v. Dix*, 2 Gray, 181; *Spofford v. Harlow*, 3 Allen, 176; *Clay v. Wood*, 5 Esp. 44; *Wayde v. Lady Carr*, 2 Dowl. & R. 255. See *Brooks v. Hart*, 14 N. H. 307.

⁷ *McLane v. Sharp*, 2 Harr. (Del.) 481; *Strouse v. Whittlesey*, 41 Conn. 559; *Beckerlee v. Weiman*, 12 Mo. App. 354.

the other party was not.¹ The traveler is not obliged to go to the extreme right; it is sufficient that he goes far enough for the other to pass safely.² Nor need a traveler keep on the right side of the road all the time; this is required of him only when meeting another traveler.³ A driver on the wrong side of the road must use greater care than if he was on the proper side.⁴ If he is on the wrong side of the road, he must give way to a vehicle on the right side.⁵ The duty under a statute to turn to the right, it is held, does not apply where one vehicle is going along a street into which another is turning from a cross street,⁶ nor where two vehicles meet at the intersection of two streets.⁷ Under a statute requiring travelers meeting each other on the highway to drive to the right of the middle of the traveled part of the road or bridge when practicable, it is the duty of the traveler, when it is difficult or unsafe for him to drive to the right, to stop a reasonable length of time at some convenient part of the road to enable the other person to pass, and without any request from him.⁸ The fact that the plaintiff was at the time of the collision on the wrong side of the road does not prevent his recovering if the defendant could nevertheless, by the exercise of ordinary care, have avoided the injury.⁹ Nor does the fact that the defendant is thus violating the law of the road entitle the plaintiff to recover damages of him, if the plaintiff could have avoided the collision by the exercise of ordinary care; he cannot negligently or wantonly run into the defendant, and then

¹ Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249; Parker v. Adams, 12 Met. 415; 46 Am. Dec. 694.

² Wordsworth v. Willan, 5 Esp. 273.

³ Parker v. Adams, 12 Met. 415; 46 Am. Dec. 694; Daniels v. Clegg, 28 Mich. 32; Palmer v. Barker, 11 Me. 338; Wordsworth v. Willan, 5 Esp. 273; Brooks v. Hart, 14 N. H. 307.

⁴ Pluckwell v. Wilson, 5 Car. & P. 375.

⁵ Palmer v. Barker, 11 Me. 338.

⁶ Lovejoy v. Dolan, 10 Cush. 495; Smith v. Gardner, 11 Gray, 418.

⁷ Garrigan v. Berry, 12 Allen, 84.

⁸ Kennard v. Burton, 25 Me. 39; 43 Am. Dec. 249. And see Earing v. Lanning, 7 Wend. 185.

⁹ Jones v. Andover, 10 Allen, 20; Clay v. Wood, 5 Esp. 44; Chaplin v. Hawes, 3 Car. & P. 555; Simmonson v. Stellenmerf, 1 Edm. Sel. Cas. 194; Smith v. Gardner, 11 Gray, 418.

make him pay damages for the resulting harm simply because the defendant was violating the law.¹ Persons meeting on highways owe to each other reciprocal duties, and are bound to use reasonable precautions to avoid collision.²

The law of the road or the statutes of this country do not apply as between a person on horseback and a vehicle,³ or a vehicle and a pedestrian;⁴ nor where both vehicles are going in the same direction;⁵ nor to vehicles not moving or passing;⁶ nor to buildings that are being moved through a public highway.⁷ When a driver attempts to pass another going in the same direction on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless he is guilty of such recklessness, or even gross carelessness, as would bring disaster upon himself.⁸ The Michigan statute, adopted from Massachusetts, enacts that the traveler shall "seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of such bridge or road, so that the respective carriages or other vehicles aforesaid may pass each other without interference." The "traveled part" of the road was formerly, in Massachusetts, held to mean that part which is wrought for traveling, and was not confined simply to the most traveled wheel-track, or to any track which might happen to be made in the road by the passing of vehicles;⁹ and the supreme court of Michigan, adopting with the statute

¹ *Parker v. Adams*, 12 Met. 415; 46 Am. Dec. 694; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Daniels v. Clegg*, 28 Mich. 32.

² *O'Malley v. Dorn*, 7 Wis. 236; 73 Am. Dec. 403.

³ *Dudley v. Bolas*, 24 Wend. 465. *Aliter* in England: *Turley v. Thomas*, 8 Car. & P. 103.

⁴ *Cotterill v. Starkey*, 8 Car. & P. 691.

⁵ *Bolton v. Couler*, 1 Watts, 360; *Mayhew v. Boyce*, 1 Stark. 423; *Foster v. Goddard*, 40 Me. 64.

⁶ *Johnson v. Small*, 5 B. Mon. 25.

⁷ *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 537.

⁸ *Avegno v. Hart*, 25 La. Ann. 235; 13 Am. Rep. 133.

⁹ *Clark v. Commonwealth*, 4 Pick. 125; *Jaquith v. Richardson*, 8 Met. 213.

the construction which had been previously put upon it by the Massachusetts court, adheres to the same view,¹ though the Massachusetts court holds that the statute imposes an obligation to turn to the right of the middle, — not of the wrought part of the road, but of the part traveled by wheels.² A statute requiring travelers meeting each other to “seasonably turn their carriages to the right of the center of the road” means to the right of the center of the wrought part of the road, although the whole of the smooth or most traveled part may be on the side of that center.³ But when the wrought part of the road is obscured by snow, so that the traveler may not know where it really lies, it will be sufficient for the traveler to turn to the right of the center of the beaten or traveled track, without reference to the wrought part.⁴

ILLUSTRATIONS. — A person was driving a vehicle at night at a fast rate, and on the wrong side of the road. *Held*, no defense in an action against him for a collision that he did not have time after discovering the approaching vehicle to turn out. *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194.

§ 1167. **Pedestrian and Vehicle — Horseman.** — Pedestrians and vehicles have equal rights on the highway, and of each is required such care and diligence as is necessary to prevent or escape injury.⁵ To render the driver or master of the vehicle liable, there must be some proof of negligence on his part. The court will not send the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the presence of negligence

¹ *Daniels v. Clegg*, 28 Mich. 32, 44.

² *Commonwealth v. Allen*, 11 Met. 403.

³ *Earing v. Lansingh*, 7 Wend. 185.

⁴ *Smith v. Dygert*, 12 Barb. 613; *Jaquith v. Richardson*, 8 Met. 213.

⁵ *Brooks v. Schwerin*, 54 N. Y. 343; *Barker v. Savage*, 45 N. Y. 191; 6 Am. Rep. 66; *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578; *Myers v. Dixon*, 3 Jones & S. 390; *Springett v. Ball*, 4

Fost. & F. 472; *Quirk v. Holt*, 99 Mass. 164; 96 Am. Dec. 725. A company having “right of way while going to a fire” is not thereby relieved from liability for an injury caused by its negligence: *Newcomb v. Boston Protective Department*, 146 Mass. 596; 4 Am. St. Rep. 354. That the driver of a carriage was intoxicated is relevant on the question of his care: *Wynn v. Allard*, 5 Watts & S. 524.

on the defendant's part. The care must be proportionate to the danger; hence a driver must be more alert when approaching a crossing than when away from one.¹ A pedestrian has a right to cross the street at a place other than at a crossing,² and one who, failing to keep a look ahead, runs him down is liable.³ A pedestrian crossing a street should look both ways before making the attempt, and failing to do so will amount to contributory negligence,⁴ or at least will be strong evidence of it.⁵ Footmen have no superiority of right at street crossings over teams; they have the right in common, each equally with the other, and in its exercise are bound to use reasonable care for their own safety, and to avoid doing injury to any others who may be in the exercise of the equal right of way with them.⁶ A charge that ordinarily the law requires the same diligence from the driver of a carriage as from a foot-passenger is erroneous.⁷

A person on foot or on horseback cannot compel a teamster who has a heavy load to leave the beaten part of the road, if there is sufficient room to pass; and this rule applies where a person on horseback meets a buggy, carrying three persons, drawn by a single horse.⁸ A person who while walking on a sidewalk is injured by a wagon backing upon it is not contributorily negligent merely because he failed to take to the street. He had a right to the use of the sidewalk, and was under no obligation to surrender it to the defendant's wagon, which was

¹ *Williams v. Richards*, 3 Car. & K. 81; *Barker v. Savage*, 45 N. Y. 194; 6 Am. Rep. 66; *Murphy v. Orr*, 96 N. Y. 14.

² *Cotterill v. Starkey*, 8 Car. & P. 691; *Raymond v. Lowell*, 6 Cush. 524; 53 Am. Dec. 57; *Moebus v. Herrmann*, 108 N. Y. 349; 2 Am. St. Rep. 440.

³ *Springett v. Ball*, 4 Fost. & F. 472; *Simons v. Gaynor*, 89 Ind. 165.

⁴ *Barker v. Savage*, 1 Sweeny, 288; 45 N. Y. 191; 6 Am. Rep. 66. The duty to look up and down a street be-

fore attempting to cross the track of a railroad does not as a matter of law attach to one who is about to pass from one side to another of a city street: *Moebus v. Herrmann*, 108 N. Y. 349; 2 Am. St. Rep. 440.

⁵ *Williams v. Grealy*, 112 Mass. 79.

⁶ *Barker v. Savage*, 45 N. Y. 191; 6 Am. Rep. 66; *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 573.

⁷ *Carter v. Chambers*, 79 Ala. 223.

⁸ *Beach v. Parmeter*, 23 Pa. St. 196.

wrongfully on the sidewalk.¹ A person, though infirm from disease, has a right to walk in the carriage-way if he pleases, and is entitled to the exercise of reasonable care on the part of the drivers of vehicles.² One is not obliged to look behind him for vehicles.³ Where vehicles are following each other closely in the streets of a city, a foot-passenger is not entitled to hazard the result of a nice calculation as to whether he can pass between; to do so is negligence, and if in the attempt he is injured, he cannot recover.⁴ A horseman should yield the road to the driver of a vehicle.⁵ But a traveler on horseback meeting another horseman or a vehicle is not required to turn in any particular way to avoid collision; he must exercise due care under the circumstances.⁶ A bicycle is a "carriage," within the meaning of a statute providing that "if any person driving any sort of carriage shall drive the same furiously, so as to endanger the life or limb of any passenger, every person so offending" is liable to pay a fine.⁷ Persons laboring upon the highway are entitled to protection as against passing vehicles. The same rules apply between such laborers and the traveling public as between travelers generally, and the former are bound to keep watch of the approach of the latter.⁸ The laborer must so dispose of his materials that passing vehicles will not be liable to injure him.⁹

ILLUSTRATIONS.—A woman was crossing Ninth Avenue, in the city of New York, at the Twenty-second Street crossing, from the west to the east side. When near the east side, she was intercepted by a passing truck. She stopped on the crosswalk to let the truck pass, when a horse and wagon belonging to the defendants, in charge of a boy, who was driving

¹ *New Jersey Ex. Co. v. Nichols*, 33 N. J. L. 434; 97 Am. Dec. 722.

² *Boss v. Litton*, 5 Car. & P. 407.

³ *Undhejem v. Hastings*, 38 Minn. 485.

⁴ *Belton v. Baxter*, 54 N. Y. 245; 58 N. Y. 411.

⁵ *Washburn v. Tracy*, 2 D. Chip. 128; 15 Am. Dec. 661.

⁶ *Dudley v. Bolles*, 24 Wend. 465.

⁷ *Taylor v. Goodwin*, 27 Week. Rep. 489.

⁸ *Quirk v. Holt*, 99 Mass. 164; 96 Am. Dec. 725.

⁹ *Pryor v. Valer*, 9 Phila. 95.

fast, came diagonally across the avenue, struck her, and she was thrown down and injured. She heard the noise of the horse and wagon when within a few feet of her, raised her hands, and called to the boy; but he neither saw nor heard her. *Held*, that the facts justified a finding of negligence on the part of the defendants, and of no contributory negligence on the part of the plaintiff: *Sheehan v. Edgar*, 58 N. Y. 631. An old woman of sixty-four years, and lame, was crossing Third Avenue, in New York City, at ten o'clock in the morning. The driver of a cart going at the rate of four miles an hour, when at a distance of twelve feet from her, called to her, which call was heard by persons more distant from the cart than she, but she nevertheless kept on, and was run down and injured. *Held*, that a charge by the court to the jury to the effect that she was only required to look ahead along the crossing, and if in so looking she discovered no obstacle, then she was not negligent in proceeding to cross, was erroneous: *Barker v. Savage*, 1 Sweeny, 288; 45 N. Y. 191. While an omnibus was proceeding at a moderate pace on a street, the evening being dark, and snow falling fast, the wife of the plaintiff, accompanied by another woman, attempted to cross the road (not at any ordinary crossing-place) in front of the omnibus; but, alarmed by the approach of another vehicle from the opposite direction, turned back, and was knocked down and run over by the omnibus before she could regain the pathway, and so injured that she died. The defendant's omnibus was on its right side, and within seven or eight feet of the curb. The only circumstance which was at all suggestive of negligence on the part of the defendant's servant was, that though he saw the woman cross in front of his omnibus, he had, at the moment they turned back, looked round to speak to the conductor, and was not aware of their danger until warned by the cry of a by-stander, but too late to avert the mischief. *Held*, that there was no evidence of negligence to go to the jury: *Cotton v. Wood*, 8 Com. B., N. S., 568. A city ordinance permitted the occupants of stores on streets where horse-car tracks were close by the sidewalk to occupy a part of the sidewalk with a "cart or other vehicle." Defendant was such an occupant, and the horse attached to his vehicle stood on the sidewalk. Plaintiff slipped and fell against the horse's leg. The horse raised his leg and brought his hoof down on plaintiff's ankle. *Held*, that an action for the injury would not lie: *Merritt v. Fitzgibbons*, 102 N. Y. 362.

§ 1168. **Collisions with Runaway Horses.**—That a horse runs away upon a highway is not conclusive evi-

dence of negligence on the part of its owner or custodian;¹ but it is evidence of negligence.² If the defendant lost control of his horse in consequence of his own prior fault, he cannot excuse himself.³ If the injury was the result of racing, or driving a fast horse in the streets of a city at a high rate of speed, the defendant may be liable for exemplary damages.⁴ It is not negligence *per se* to leave a horse unhitched in a street of a city. It must appear that the horse was of a restive character, or of vicious propensities,⁵ or that no one was left to observe him, or other like circumstances; and here the question of negligence is left to the jury.⁶ If the horse is left unhitched, but in the care of a proper person, and it breaks away in consequence of being frightened by a passing show,⁷ or by falling icicles,⁸ a person injured by the horse in running away cannot recover. But it may be negligence to leave it in the care of a small boy,⁹ or to hitch horses by the lines to a rubber block, within ten feet of a railroad switch.¹⁰ And where there is a city ordinance requiring horses in the street to be hitched, the failure to do so is negligence.¹¹

ILLUSTRATIONS. — A person lawfully at work upon a public street of a city without fault on his part suffered damages from a team harnessed to a baggage-wagon running away. *Held*, that the owners were liable, it appearing that their driver and servant was negligent in leaving the team standing on the public street insecurely hitched and unattended while he was carrying a trunk from the wagon to a house twenty or thirty feet distant: *Moulton v. Aldrich*, 28 Kan. 300. The driver of a carriage used for the conveyance of passengers for hire left his

¹ *Kennedy v. Way*, Brightly, 186; *Gottwald v. Bernheimer*, 6 Daly, 212; *Quinlan v. R. R. Co.*, 4 Daly, 487; *Furlong v. R. R. Co.*, MS., cited 6 Daly, 214; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Streett v. Laumier*, 34 Mo. 469.

² *Hummell v. Wester*, Brightly, 133; *Stump v. Edens*, 22 Wis. 432.

³ *Kennedy v. Way*, Brightly, 186.

⁴ *Kennedy v. Way*, Brightly, 186.

⁵ *Albert v. R. R. Co.*, 2 Daly, 380.

⁶ *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Streett v. Laumier*, 34 Mo. 469; *Albert v. R. R. Co.*, 2 Daly, 389.

⁷ *Goodman v. Taylor*, 5 Car. & P. 410.

⁸ *Bigelow v. Reed*, 51 Me. 325.

⁹ *Fraser v. Kimler*, 2 Hun, 514.

¹⁰ *Wagner v. Goldsmith*, 78 Ind. 517.

¹¹ *Siemers v. Eisen*, 54 Cal. 418; *Bott v. Pratt*, 33 Minn. 323; 53 Am. Rep. 47.

carriage with the horses attached thereto and unhitched while he entered a hotel. No one was left in charge of the horses. Before his return they ran off, and one of the passengers in attempting to leap from the carriage was injured. *Held*, liable. *Youmans v. Padden*, 1 Mich. N. P. 127. Defendant's horses, while being driven by him with due care on a public highway, were frightened by a locomotive, became unmanageable, and ran upon plaintiff's land and broke a post there. *Held*, that the defendant was not liable: *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372.

§ 1169. **Contributory Negligence—Duty to Look for Defects and Dangers.**—A person cannot recover for injuries occasioned by a defect or obstruction in the highway, where he did not use ordinary care in avoiding the obstruction or defect.¹ On the principle that one is not obliged to presume in advance that another will be negligent, it is not required that a person on the highway shall have his eyes constantly upon the road or sidewalk to discover defects there or dangers.² Therefore, the following do not in law amount to contributory negligence: That the plaintiff did not see a hole in the sidewalk because her eyes were not upon the sidewalk at the time;³ that the plaintiff might have seen an open hatchway in the sidewalk but for the fact that his attention was attracted in another direction;⁴ that the plaintiff at the moment of striking her foot against a misplaced plank in the sidewalk allowed her attention to be attracted to a runaway horse on the street;⁵ that an absorption of the mind in business prevented a defect being seen;⁶ that he was holding the reins in one hand and assisting his boys to a seat

¹ *Smith v. Smith*, 2 Pick. 621; 13 Am. Dec. 464; *Johnson v. Whitefield*, 18 Me. 286; 36 Am. Dec. 721; *King v. Thompson*, 87 Pa. St. 365; 30 Am. Rep. 364.

² *Hill v. Seekonk*, 119 Mass. 85; *Koch v. Edgewater*, 14 Hun, 544; *Clark v. Lockport*, 49 Barb. 580; *Hawks v. Northampton*, 121 Mass. 10; *Gerald v. Boston*, 108 Mass. 580; *Woods v. Boston*, 121 Mass. 337; *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

³ *Woods v. Boston*, 121 Mass. 337; *Barry v. Terkildsen*, 72 Cal. 254; 1 Am. St. Rep. 55.

⁴ *Barstow v. Berlin*, 34 Wis. 357; *Houston v. Traphagen*, 47 N. J. L. 23.

⁵ *Weisenberg v. Appleton*, 26 Wis. 56; 7 Am. Rep. 39.

⁶ *Driscoll v. New York*, 11 Hun, 101.

with the other, and that in so doing his attention was diverted from the control of his team and the condition of the highway;¹ that he was lying down upon his load wrapped up in blankets.² Neither does the law require that the thoughts of the traveler shall be all the time fixed upon even those defects which he may have previously noticed.³ It is not negligence *per se* for the occupant of a store directly opposite a sidewalk encumbered by the abutting owner's improvements to pass along that walk instead of the unencumbered one;⁴ nor to drive in a violent storm through the streets of a city with which the driver is unacquainted;⁵ nor for a traveler to drive his team down a street, the dangerous condition of which is concealed by a light snow just fallen; nor is the fact that he is the only person that has passed since the fall of the snow, as shown by the absence of any tracks, sufficient to put him on his guard, and oblige him to examine the condition of the street before traveling over it.⁶ One lawfully in the street of a city with his team is not necessarily guilty of contributory negligence in failing to look behind him and discover—as he might have done—a runaway team in time to avoid it.⁷ One entering a narrow and dark alley is bound to keep his eyes open and about him if he would recover for an injury suffered by reason of a pitfall in such a place.⁸

ILLUSTRATIONS.—A stands on a street-corner in a city, and a cart of B, loaded with lumber, is passing. A starts to cross the street, and at the same time the cart attempts to turn the corner. Some long planks extending behind the cart strike A, injuring her. *Held*, that A's failure to observe the unusual and dangerous appendage to the cart, and to calculate the sweep it would make in turning the corner, is not *per se* contributory negligence: *Sheehy v. Burger*, 62 N. Y. 558. The plaintiff ap-

¹ *Cremer v. Portland*, 36 Wis. 92.

² *Parish v. Eden*, 62 Wis. 272.

³ *George v. Haverhill*, 110 Mass. 514; *Thomas v. W. U. Tel. Co.*, 100 Mass. 156; *Mahoney v. R. R. Co.*, 104 Mass. 73.

⁴ *Stephens v. Macon*, 83 Mo. 345.

⁵ *Milwaukee v. Davis*, 6 Wis. 377.

⁶ *Clark v. Lockport*, 49 Barb. 580.

⁷ *Moulton v. Aldrich*, 28 Kan. 300.

⁸ *Lombard v. Chicago*, 4 Biss. 460.

proaching a railroad crossing endeavored to turn his wagon around to avoid a train. The road had a high embankment on each side, on one side only of which was a railing. The plaintiff observed the railing on this side, but not the lack of it on the other. In backing he was precipitated over the unprotected side. *Held*, that his failure to look on both sides was not contributory negligence *per se*: *Gillespie v. Newburgh*, 54 N. Y. 468. The owner of a team failed to chain the wheels of his heavily loaded team when going down a steep hill. *Held*, evidence of negligence: *Aldrich v. Monroe*, 60 N. H. 118. Plaintiff while walking on a sidewalk five feet in width, in the enjoyment of sufficient light and such eyesight as to enable her to discern the limits of the walk, stepped off into a ditch and was injured. *Held*, that she could not recover: *McLaury v. McGregor*, 54 Iowa, 717. Plaintiff desiring to cross a street in a city, and seeing a car coming, and behind it a cart which was going faster than the car, made his "calculation" that he could cross in front of the car "before the cart could get up." He accordingly made the attempt to cross, and passed in front of the car, but came in contact with the cart and was injured. *Held*, that plaintiff was guilty of contributory negligence: *Belton v. Baxter*, 54 N. Y. 245; 13 Am. Rep. 578. Plaintiff while riding in a buggy in one direction, and looking and talking to persons in the other direction, drove into a child's swing suspended between the sidewalk and the traveled portion of the street, and was thrown out and injured. *Held*, that he was guilty of contributory negligence: *Tuffree v. State Center*, 57 Iowa, 538. A woman diagonally crossing a street in full daylight, with her back partially turned towards an approaching wagon, and wearing a sun-bonnet. *Held*, not guilty of contributory negligence: *Shea v. Reems*, 36 La. Ann. 966.

§ 1170. What is and What is not Proper Use of Highway by Traveler.—Travelers are not bound to keep in motion every instant they are on the road. They have a right to stop temporarily, for business or pleasure, provided they do not unreasonably interfere with the rights of others who wish to use the road.¹ It is not negligence for a pedestrian to use the carriage-path of the highway,² especially if the sidewalk be in bad condition; but he is bound to use more care under these circumstances, particularly

¹ 2 Thompson on Negligence, 1200; *Hussey v. Ryan*, 54 Md. 426; 54 Am. Rep. 772.

² *Coombs v. Purrington*, 42 Me. 332; *Raymond v. Lowell*, 6 Cush. 530; 53 Am. Dec. 57.

if he walks in the road at night.¹ But a person will not be permitted to recover damages for an injury received from a defect in the highway while using it for a purpose prohibited by law,² nor for other uses than those which pertain to public travel, though not prohibited; as leaning or sitting upon railings erected as barriers.³ A traveler does not forfeit his rights by stopping momentarily to pick berries by the wayside,⁴ or to fill up a small hole in the road which might otherwise become a means of injury to other travelers,⁵ or for no other purpose than to gratify his curiosity; as, to watch the progress of a horse-trade;⁶ or to watch workmen punching a hole in a gas-main, from which operation the traveler receives an injury to his eye from a particle of the iron chipped off;⁷ or to sit down on a step to rest.⁸ Children stopping on the street to watch others at play do not cease to be "travelers."⁹ A child, however, using a highway as a play-ground, and not for travel, cannot recover for an injury received during such use, although the injury resulted from a defect in the road.¹⁰ But it has been held that the use of a sidewalk by a child to roll its hoop upon is not an improper use.¹¹ A

¹ *Boss v. Litton*, 5 Car. & P. 407.

² 2 Thompson on Negligence, 1200.

³ 2 Thompson on Negligence, 1200.

⁴ *Britton v. Cummington*, 107 Mass. 347.

⁵ *Babson v. Rockport*, 101 Mass. 93.

⁶ *Bigelow v. Reed*, 51 Me. 325.

⁷ *Cleveland v. Spier*, 16 Com. B., N. S., 399.

⁸ *Kaples v. Orth*, 61 Wis. 531.

⁹ *Bliss v. Inhabitants*, 145 Mass. 91; 1 Am. St. Rep. 441.

¹⁰ *Stinson v. Gardiner*, 42 Me. 248; 66 Am. Dec. 281.

¹¹ *Keefe v. Chicago*, 114 Ill. 222; 55 Am. Rep. 660, the court saying: "A sidewalk is for the passage of persons only, and we have not had in contemplation any case of it otherwise. Whether it be passed over for business or for pleasure, or merely to gratify idle curiosity, we think the use is lawful. A child may lawfully be upon the sidewalk for pleasure only, that is to

say, for play, and the city owes the same duty to have the sidewalk in a reasonably safe state of repair in respect of it that it does in respect of those who are on the sidewalk passing to or returning from their places of business or abode. It may be true that the child will be less careful in its mode of using the sidewalk while playing than the business man will be while traveling to or from his place of business or abode; but this belongs to the domain of fact, and not to that of law. It may be so in most cases; it is not inevitably so in all cases. It is for the jury, not the court, to say what, in a given case, was the conduct of the parties." And the court dissent from the language of an earlier case, where it was said: "For it is to be borne in mind that it is not the duty of the city of Chicago to make its streets a safe play-ground for children. That is not the purpose for which streets are de-

horse which has escaped and is running loose upon the highway is not using it legitimately, and no action, therefore, can be maintained by the owner thereof for an injury received by it from a defect in the highway.¹ Leaving a buggy standing at an angle to the beaten track, and so near that by backing one foot it would be in the way of passing vehicles, is negligence.² But to leave a horse fastened only by a strap and weight while the wagon is backed up to the sidewalk to be loaded, although the team thereby extends half across the highway and is liable to be hit by a runaway, is not negligence.³

ILLUSTRATIONS. — The plaintiff, a boy eight years old, on his return from carrying dinner to his father, crossed the way to look at some toys in a window over a grating in the sidewalk, and, as he turned away, his foot slipped into the grating, causing injuries. *Held*, that he was not, in law, improperly using the highway: *Hunt v. Salem*, 121 Mass. 294. A child seven years of age, while walking in the evening with his father on a plank footway upon a bridge which the defendant city was bound to keep in repair, stepped aside to clasp in sport a post forming part of the bridge, and fell through a hole in the planking, eleven inches square, near the post, not known to either the boy or his father, and was drowned. The father knew of the boy's intention to clasp the post, and did not forbid his doing so. *Held*, not contributory negligence *per se*: *Gulline v. Lowell*, 144 Mass. 491; 59 Am. Rep. 102.

§ 1171. **Rate of Speed — Manner of Driving.** — Whether a pedestrian is negligent in going at too great speed at night is a question in the particular case for the jury.⁴ It is not *per se* negligence to drive rapidly through a city street;⁵ nor for a fireman to run through the streets to a fire at night.⁶ It has been held not contributory negli-

signed": *Chicago v. Starr*, 42 Ill. 177. A girl fourteen years old, while skipping rope upon a sidewalk in the daytime, fell into an open area and was injured. *Held*, that the girl had a right thus to use the sidewalk, and the owner of the estate was liable for her injury: *McGuire v. Spence*, 91 N. Y. 303; 42 Am. Rep. 601, note.

¹ *Richards v. Enfield*, 13 Gray, 344.

² *Joslin v. Le Baron*, 44 Mich. 160; 41 Mich. 313.

³ *Greenwood v. Callaban*, 111 Mass. 298.

⁴ *Elgin v. Renwick*, 86 Ill. 498.

⁵ *Carter v. Chambers*, 79 Ala. 223; *Reynolds v. Hanrahan*, 100 Mass. 313;

⁶ *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *Palmer v. Portsmouth*, 43 N. H. 265.

gence that the plaintiff drove over a bridge on a slow trot of about four and one half miles an hour, when it was so dark that he could not see two feet ahead;¹ or that the plaintiff rode a safe horse, on a dark night, bareback and without martingales, at a speed of five or six miles per hour, over a familiar road;² nor that a skillful driver drove a safe horse, with a tight rein, at night, at his usual speed of ten miles an hour, over a wide and level road, with which he was familiar, and over which he had passed in safety an hour previously without perceiving any obstruction;³ nor hallooming on the highway to a driver that a team wants to pass him, although the sound frightens the driver's horse and brings about a collision;⁴ nor is it contributory negligence to allow a woman to drive,⁵ or a boy of twelve.⁶

§ 1172. **At Night.**—What degree of care is essential on the part of a person walking or riding upon the highway in the night-time is a question for the jury in most cases, to be judged of by a consideration of the particular circumstances.⁷ Naturally, greater care and watchfulness are required of a traveler at night than by day;⁸ but the traveler has the same right to assume that there is no defect or impediment in the street, not protected either by a light or a railing.⁹ It has been held not negligence *per se* to walk on a sidewalk or over a bridge on a dark night without a light;¹⁰ or to drive on the road on a dark night, allowing the horse to take his own course.¹¹

¹ Bly v. Haverhill, 110 Mass. 520.

² Stevens v. Boxford, 10 Allen, 25.

³ Reed v. Deerfield, 8 Allen, 522.

⁴ Pigott v. Lilly, 55 Mich. 150.

⁵ Cobb v. Standish, 14 Me. 198; Bigelow v. Rutland, 4 Cush. 247; Blood v. Tyngsborough, 103 Mass. 509; Babson v. Rockport, 101 Mass. 93.

⁶ Bronson v. Southbury, 37 Conn. 199.

⁷ 2 Thompson on Negligence, 1198; Stier v. Oskaloosa, 41 Iowa, 353; Durant v. Palmer, 29 N. J. L. 544; Vale v. Bliss, 50 Barb. 358; Barton v. Springfield, 110 Mass. 131; Perkins v.

R. R. Co., 34 Wis. 435; Stevens v. Boxford, 10 Allen, 25; 87 Am. Dec. 616.

⁸ Stier v. Oskaloosa, 41 Iowa, 353.

⁹ Cases in first note in this section, and Bateman v. Ruth, 3 Daly, 378; Reed v. Deerfield, 8 Allen, 522.

¹⁰ Maloy v. R. R. Co., 58 Barb. 182; Swift v. Newbury, 36 Vt. 355; Osage City v. Brown, 27 Kan. 74; Altoona v. Lotz, 114 Pa. St. 238; 60 Am. Rep. 346; Glidden v. Reading, 38 Vt. 52; 88 Am. Dec. 639.

¹¹ Rector v. Pierce, 3 Thomp. & C. 415; Wright v. Saunders, 58 Barb. 214; 3 Keys, 323.

ILLUSTRATIONS. — Plaintiff collided with a wagon left standing by the defendant in a highway. Plaintiff was accustomed to drive horses, and the accident happened while he was driving a gentle horse, on a dark night, on a slow trot, looking out on one side of the horse for a blanket which he had lost shortly before from his wagon, while his companion was looking for the blanket on the other side, and neither of them saw the defendant's wagon before the collision, though the plaintiff had seen the obstruction there on the day of the accident. He had a right to suppose that the unlawful obstruction would have been removed before nightfall. *Held*, not guilty of contributory negligence: *Fox v. Sackett*, 10 Allen, 535; 87 Am. Dec. 682.

§ 1173. **Skittish or Scared Horse—Defective Vehicle or Harness.** — It is held by some courts that no recovery can be had where the injury is the joint result of a defect in the highway and a fright on the part of the horse, causing the driver to lose control of him,' except where the fright of the horse is the result of the defect in the highway.² But in other courts the traveler is allowed to recover for the result of a defect in the highway, and an accidental fright of the horse.³ The plaintiff may be guilty of contributory negligence in riding in an obviously defective wagon,⁴ or with imperfect harness, or a horse badly shod, or a wagon not supplied with a brake.⁵ In some states it is held that if a defect in the plaintiff's carriage, though it were unknown to him, contribute jointly with a defect in the highway to produce an injury to the plaintiff, there can be no recovery, on the principle that "the plaintiff must show that the accident occurred wholly by the defect of the road, and without any fault on his part."⁶ In others the rule is, that if the de-

¹ *Davis v. Dudley*, 4 Allen, 558; *Murdock v. Warwick*, 4 Gray, 178; *Titus v. Northbridge*, 97 Mass. 258; 93 Am. Dec. 91; *Fogg v. Nahant*, 98 Mass. 578; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 152; *Jackson v. Belleview*, 30 Wis. 250.

² *Kelley v. Fond du Lac*, 31 Wis. 179; *Montgomery v. Scott*, 34 Wis. 338.

³ *Lower Macungie v. Merkhoffer*, 71 Pa. St. 276; *Baldwin v. Turnpike*

Co., 40 Conn. 238; *Brookville Turnpike Co. v. Pumphrey*, 59 Ind. 78; *Winship v. Enfield*, 42 N. H. 197; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Hunt v. Pownall*, 9 Vt. 411.

⁴ *Hammond v. Mukwa*, 40 Wis. 35.
⁵ *Allen v. Hancock*, 16 Vt. 230.
See *Lindsey v. Danville*, 45 Vt. 72.

⁶ 2 Thompson on Negligence, 1208; *Farrar v. Greene*, 32 Me. 574; *Moore v. Abbott*, 32 Me. 46.

fect is unknown to the plaintiff, in the exercise of reasonable care in the selection of his vehicle and harness, it will not avail as a defense, where the injury results from this defect and the condition of the highway jointly.¹

ILLUSTRATIONS.—The plaintiff was injured by falling into an open cellar, the wall of which extended into the street. The plaintiff, driving one horse in a chaise, stopped near the cellar, and turned the animal to one side in order to admit some one into the carriage. He then attempted to turn the horse sufficiently to bring him into the road; but the horse came back too far, and began to back. He then slapped the animal with the reins to start him forward, and the horse stopped; but the rear wheels were then passing over the cellar-wall, and the plaintiff, in attempting to jump out, was caught by the fender, and, together with horse and vehicle, fell into the cellar. *Held*, insufficient to establish the defense of a want of the exercise of ordinary care on his part: *Nichols v. Brunswick*, 3 Cliff. 81. A horse was frightened by a defect in the highway, and the driver, to stop his running, turned him towards a bank, where the horse struck a post outside the traveled part of the highway. *Held*, that the plaintiff was not entitled to recover, although he had used due and reasonable care in the selection and management of his horse: *Brooks v. Acton*, 117 Mass. 204. Plaintiff's horses, while he was driving, took fright from an attack by defendant's dog, and plaintiff brought suit for injuries sustained from falling from the wagon. *Held*, that neither the fact that he rose to his feet when the horses started, nor that the seat was not fastened to the wagon, affected his right of recovery: *Meracle v. Down*, 64 Wis. 323. Defendant's cars had run off the track at a highway crossing. The plaintiff undertaking to drive a horse over the crossing, the horse showed fright at the upturned cars, but the plaintiff persisted, the horse ran, and the plaintiff was injured. There was another road near, which the plaintiff might have taken. *Held*, contributory negligence: *Pittsburg etc. R. R. Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580. A horse is frightened at the noise of steam escaping from an engine, and the owner of the horse, instead of leading the horse away, leads him toward the engine, and he becomes unmanageable, and rears and falls backward, and breaks his neck. *Held*, that the owner is guilty of contributory negligence: *Louisville and Nashville R. R. Co. v. Schmidt*, 81 Ind. 264.

¹ *Palmer v. Andover*, 2 Cush. 600; *v. Barrington*, 41 N. H. 44; *Hodge v. Tuttle v. Farmington*, 58 N. H. 63; *Bennington*, 43 Vt. 450; *Tucker v. Dreher v. Fitchburg*, 22 Wis. 675; *Henniker*, 41 N. H. 317. *Fletcher v. Barnet*, 43 Vt. 192; *Clark*

§ 1174. **When Plaintiff has Knowledge of Defect.**— Knowledge of a defect in a highway is not conclusive evidence of negligence in attempting to pass it.¹ A person is not obliged to keep away from a street because he knows beforehand or sees that there are defects in it.² He may attempt to pass over it, provided he uses due care under the circumstances.³ But he is guilty of contributory negligence if knowing of and seeing the defect he recklessly rushes into it, and he must take the consequences.⁴ If one is possessed of positive knowledge that the defect is dangerous, and, in addition to this circumstance, that there is another and safer way, no recovery can be had for an injury to person or property from an attempt to pursue the dangerous course.⁵ But it is not

¹ *Smith v. St. Joseph*, 45 Mo. 449; *Kenworthy v. Ironton*, 41 Wis. 647; *Whitaker v. Boylston*, 97 Mass. 273; *Lyman v. Amherst*, 107 Mass. 339; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 663; *Weed v. Ballston Spa*, 76 N. Y. 329; *Wilson v. Road Co.*, 93 Ind. 287; *Smith v. Clark*, 3 Lans. 208; *Ross v. Davenport*, 66 Iowa, 548; *Fulham v. Muscatine*, 70 Iowa, 436; *Henry Co. Tp. Co. v. Jackson*, 86 Ind. 111; 44 Am. Rep. 274; *Bassett v. Fish*, 75 N. Y. 303; *Mayor v. Holmes*, 39 Md. 241.

² *Rice v. Des Moines*, 40 Iowa, 638; *Reed v. Northfield*, 13 Pick. 94; 23 Am. Dec. 662. Walking on a street known to be partly obstructed by fallen telephone-wires does not necessarily show contributory negligence: *Nichols v. Minneapolis*, 33 Minn. 430; 53 Am. Rep. 56.

³ *Kelley v. Fond du Lac*, 31 Wis. 179; *Smith v. Lowell*, 6 Allen, 39; *Gilman v. Deerfield*, 15 Gray, 577; *Whitford v. Southbridge*, 119 Mass. 564; *Hinckley v. Barnstable*, 109 Mass. 126; *Clayards v. Dethick*, 12 Q. B. 439; *Baltimore v. Holmes*, 39 Md. 243; *Crumpton v. Solon*, 11 Me. 335; *Smith v. Smith*, 2 Pick. 621; *Thompson v. Bridgewater*, 7 Pick. 188; *Rindge v. Coleraine*, 11 Gray, 157; *Jacobs v. Bangor*, 16 Me. 187; 33 Am. Dec. 652; *Garron v. Bangor*, 38 Me. 443; *Noyes v.*

Morristown, 1 Vt. 353; *Folsom v. Underhill*, 36 Vt. 580; *Koch v. Edgewater*, 14 Hun, 544; *Nicks v. Marshall*, 24 Wis. 139; *Earleville v. Carter*, 2 Bradw. 34; *Craig v. Sedalia*, 63 Mo. 417; *Moore v. Shreveport*, 3 La. Ann. 645; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156. When one drives from the country into a city, it is not contributory negligence for him to drive through a public street, and through what appears to be a mere pool of water standing there, there being, in fact, a concealed hole two and one half feet deep under the pool: *Hedges v. Kansas*, 18 Mo. App. 62.

⁴ *Butterfield v. Forrester*, 11 East, 60; *Griffin v. New York*, 9 N. Y. 456; 61 Am. Dec. 700; *Cornelius v. Appleton*, 22 Wis. 635; *Goldstein v. R. R. Co.*, 46 Wis. 404; *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164.

⁵ *Centralia v. Krouse*, 64 Ill. 19; *Lovenguth v. Bloomington*, 71 Ill. 238; *Wilson v. Charlestown*, 8 Allen, 137; 85 Am. Dec. 693; *Durkin v. Troy*, 61 Barb. 437; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Wood v. Andes*, 11 Hun, 543; *Forks Township v. King*, 84 Pa. St. 230; *Parkhill v. Brighton*, 61 Iowa, 103; *McGinty v. Keokuk*, 66 Iowa, 725; *Hartman v. Muscatine*, 70 Iowa, 511. *Contra*, *Whitford v. Southbridge*, 119 Mass. 564.

necessarily negligent to try to drive on a defective road, although the driver knows the defect, if he believes it reasonably safe, and there is no other safe road.¹ One may use an unsafe sidewalk, knowing it to be unsafe, without necessarily being guilty of contributory negligence.²

A person who voluntarily attempts to pass over a sidewalk of a city which he knows to be dangerous, by reason of ice upon it or other defect in it, when he might easily avoid it, is guilty of contributory negligence.³ The plaintiff's general acquaintance with the obstruction or defect in the highway will not prevent a recovery for injuries received on this account, if under the circumstances he might still, in the exercise of ordinary prudence, be unaware of his proximity to it;⁴ as where the female plaintiff knew of the defect, but, being frightened at the attempt of a strange man to seize her, ran over the sidewalk in the dark, giving no thought to the sidewalk or her manner of going over it;⁵ and where a woman, under very similar circumstances, ran to her home on hearing that her children were in danger.⁶ But it has been held that to excuse the failure to observe a defect of which the plaintiff had knowledge, his attention must be distracted by some present necessity, and it will not be a sufficient justification that at the time of the injury the plaintiff was engaged in observing a passing buggy, to satisfy his curiosity in regard to the style of harness used upon the team.⁷ If the highway is obstructed by snow, and the traveler knows it to be dangerous or impassable,

¹ *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230.

² *Bullock v. New York*, 99 N. Y. 654; *Emporia v. Schmidling*, 33 Kan. 485; *Gilbert v. Boston*, 139 Mass. 313; *Evans v. Utica*, 69 N. Y. 166; 25 Am. Rep. 165.

³ *Schaefer v. Sandusky*, 33 Ohio St. 246; *Bloomington v. Read*, 2 Ill. App. 542; *Macomb v. Smithers*, 6 Ill. App. 470; *Indianapolis v. Cook*, 99 Ind. 10;

but see *Gilbert v. Boston*, 139 Mass. 313; *Evans v. Utica*, 69 N. Y. 166; 25 Am. Rep. 165; *Dewire v. Bailey*, 131 Mass. 169; 41 Am. Rep. 219.

⁴ 2 Thompson on Negligence, 1204; *Blood v. Tyngsborough*, 103 Mass. 509.

⁵ *Barton v. Springfield*, 110 Mass. 131.

⁶ *Weare v. Fitchburg*, 110 Mass. 334.

⁷ *Kewanee v. Depew*, 80 Ill. 119.

but persists in going on, he cannot recover damages of the town; but if he merely knows that it is obstructed, but not so much as to indicate to him that he cannot get through with safety, and he meets with an injury while proceeding with due care, he can recover, in case the town was negligent in suffering the obstruction to exist.¹ It was held a question for the jury whether the plaintiff was negligent in attempting to drive his horse and sled loaded with lumber across the tracks of a street-railroad company upon the sides of which snow had been heaped up so that the track lay in a trough twelve or fourteen inches deep.² And so where the plaintiff endeavored to pass along the top of an embankment, by the side of the highway, which the defendant neglected to keep protected by a fence or railing, and while so doing was forced over the edge by the backing of a cart, which she saw there before she came to the place of injury.³ One who drives against an obstruction which he might readily have seen is negligent;⁴ and one who crosses a bridge with an unusually heavy load does so at his own risk.⁵ The fact that a husband knew of a defect in season to have warned his wife is no defense to an action by the husband and wife for an injury to the latter.⁶ Knowledge of a defect cannot be inferred from the fact that it customarily existed.⁷ A person with poor sight must use greater care in the streets to avoid defects and dangers than those with good sight;⁸ so of one far advanced in years, and feeble.⁹

ILLUSTRATIONS. — Plaintiff knew that there were several water-bars on a hill about a quarter of a mile long over which her horse could not trot in safety. Thinking that she had crossed

¹ *Horton v. Ipswich*, 12 Cush. 488.

² *Mahoney v. R. R. Co.*, 104 Mass. 73.

³ *Snow v. Provincetown*, 120 Mass. 580.

⁴ *Yahn v. Ottumwa*, 60 Iowa, 429.

⁵ *Fulton Iron Works v. Kimball*, 52 Mich. 146.

⁶ *Street v. Holyoke*, 105 Mass. 82; 7 Am. Rep. 500.

⁷ *Hinckley v. Barnstable*, 109 Mass. 126.

⁸ *Winn v. Lowell*, 1 Allen, 177; *Peach v. Utica*, 10 Hun, 477; *Davenport v. Ruckman*, 37 N. Y. 568.

⁹ *Centralia v. Krouse*, 64 Ill. 19.

them all, she allowed her horse to trot, having a rein in each of her hands, the wheels in the regular ruts, and the horse under control. While so driving, the wagon came upon a bar which she failed to see, in consequence of which the wagon was overturned, and she was injured. *Held*, that there was evidence for the jury that she was in the exercise of due care: *Blood v. Tyngsborough*, 103 Mass. 509. A traveler driving on the highway, on coming to a bridge, stopped and ordered his servant to examine it, it being unsafe; he ordered him to examine the depth of the stream, which was reported as fordable. *Held*, ordinary care on the part of the traveler: *Branan v. May*, 17 Ga. 136. One who knew of a hole in the sidewalk, and was watching to avoid it, was prevented from so doing by a blinding snow-storm, and fell into the hole and was injured. The sidewalks on any other street leading in the direction of his home were equally unsafe. *Held*, not guilty of negligence: *Aurora v. Dale*, 90 Ill. 46. One unnecessarily undertakes to drive with a horse and wagon over a highway overflowed by a stream of water thirty or forty yards wide in some places, not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying cakes of ice twenty-five or thirty feet in diameter, and is drowned by getting off the road into the deeper channel of the river. *Held*, that his negligence defeats an action for damages: *Merrill v. North Yarmouth*, 78 Me. 200; 57 Am. Rep. 794. Plaintiff attended an evening entertainment at the defendant's public hall, and on coming out, slipped on snow and ice accumulated on the plank sidewalk in front of the door, and was injured. *Held*, that he was not precluded from recovery by the fact that he noticed the snow and ice on going in: *Dewire v. Bailey*, 131 Mass. 169; 41 Am. Rep. 219. A started to cross a bridge, which was out of repair, on a dark, rainy night, in winter-time, when very much intoxicated. He was warned that the bridge was unsafe, and that there was another bridge which he could cross, which was safe, and within a few feet of the one from which he fell. *Held*, guilty of contributory negligence: *Wood v. Village of Andes*, 11 Hun, 543. One walking along the sidewalk in the night-time stepped upon some boards which he supposed had been placed there to prevent people from walking on the other part of the sidewalk, which had the appearance of having been freshly tarred, but which were in fact placed over an excavation, and one of the boards broke, so that he fell through and was injured. *Held*, not negligent: *Hutchison v. Collins*, 90 Ill. 410.

CHAPTER LXL

INJURIES BY RAILROADS.¹

- § 1175. Railroad tracks in streets — Negligence in care of.
- § 1176. Trains frightening horses of travelers.
- § 1177. Obstruction of streets by railroad trains.
- § 1178. Street-cars — Injuries to travelers.
- § 1179. Contributory negligence of traveler.
- § 1180. Railroad crossings — Rights of public — Liability of railroad for injuries.
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- § 1189. Duty to look and listen.
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- § 1191. Persons under physical disabilities.
- § 1192. Trespassers on tracks — Duty and liability of company.
- § 1193. Persons on track by express permission.
- § 1194. Persons on track by license or custom.

§ 1175. **Railroad Tracks in Streets — Negligence in Care of.** — A railroad company which has a right to lay its tracks in the public streets must lay them properly, and keep them in proper repair; otherwise they will be liable for any injuries caused by them.² So where the railroad is by agreement with the city under the obligation of keeping a portion of the street in repair, it is responsible to any one injured by its neglect in this respect.³

¹ As to injuries to passengers, see Bailments — Carriers.

² *Lowrey v. R. R. Co.*, 4 Abb. N. C. 32; *Mazetti v. R. R. Co.*, 3 E. D. Smith, 98; *Worster v. R. R. Co.*, 50 N. Y. 203; *Rockwell v. R. R. Co.*, 64 Barb. 434; *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *Fash v. R. R. Co.*, 1 Daly, 148; *Carpenter v. R. R. Co.*, 11 Abb. Pr., N. S., 416; *Woolly v. R.*

R. Co., 83 N. Y. 121. And the street within the rails: *Conroy v. R. R. Co.*, 52 How. Pr. 49.

³ *Jenkins v. Fahey*, 11 Hun, 351; *Brooklyn v. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Troy v. R. R. Co.*, 49 N. Y. 657; *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *Masterson v. R. R. Co.*, 84 N. Y. 427; 38 Am. Dec. 510.

Thus a railroad has been held guilty of negligence where by the sinking of the pavement a spike in the rail was left exposed, with which the plaintiff's carriage coming in contact the plaintiff was thrown out and injured;¹ in leaving so wide a space between the rail and the planking in that part of its cotton-yard designed for hauling, that while a teamster is using due care his mule, in slipping upon the planking, catches his foot therein;² in negligently constructing a highway crossing.³ But a street-railway company bound to keep its track in repair and on a level with the grade of the street, and so constructed as not to impede carriage travel, is not responsible for an accident caused by the unevenness of the surface of the street, where it had worn away below the established grade.⁴ And it is not negligence *per se* for a railroad company not to block the joints of its switches.⁵

§ 1176. Trains Frightening Horses of Travelers.— Railroad companies running their trains in a proper and usual manner are not responsible for damages caused by the horses of travelers or others taking fright at the sound or appearance of the passing train.⁶ So a traveler on a road running parallel with a railroad has no cause of action against the railroad company for injuries caused by his horse taking fright from smoke caused by coaling up an engine coming in the opposite direction.⁷ Where a railroad is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a

¹ *Fash v. R. R. Co.*, 1 Daly, 148.

² *Central R. R. and Banking Co. v. Gleason*, 69 Ga. 200.

³ *Mann v. R. R. Co.*, 55 Vt. 484; 45 Am. Rep. 628.

⁴ *Galveston City R. R. Co. v. Nolan*, 53 Tex. 139.

⁵ *Chicago etc. R. R. Co. v. Lonergan*, 118 Ill. 41.

⁶ *Favor v. R. R. Co.*, 114 Mass. 350; 19 Am. Rep. 364; *Norton v. R. R. Co.*, 113 Mass. 366; *Hall v. Brown*, 54 N. H. 495; *Coy v. R. R. Co.*, 23

Barb. 643; *Culp v. R. R. Co.*, 17 Kan. 475; *Philadelphia etc. R. R. Co. v. Stinger*, 78 Pa. St. 219; *Baltimore etc. R. R. Co. v. Thomas*, 60 Ind. 107; *Peru etc. R. R. Co. v. Hasket*, 10 Ind. 409; 71 Am. Dec. 335; *Ohio etc. R. R. Co. v. Cole*, 41 Ind. 331; *Indianapolis etc. R. R. Co. v. McBrown*, 46 Ind. 229; *Cincinnati etc. R. R. Co. v. Gaines*, 104 Ind. 326; 54 Am. Rep. 334.

⁷ *Lamb v. R. R. Co.*, 140 Mass. 79; 54 Am. Rep. 449.

traveler taking fright at the necessary blowing off of steam from one of its locomotives; but if the steam were blown off negligently, it would be liable.¹ Courts will judicially know that the blowing of a whistle is one of the ordinary signals used in the running of a railway train, and that in the management of locomotive-engines it is at times necessary to open the valves and permit the escape of steam.² Whether the act was proper or not under the circumstances is generally a question for the jury.³ The following have been held to amount to negligence on the part of railroad companies in this respect, viz.: To discharge a sudden jet of steam upon a passing team, or in the yard near a highway;⁴ to sound the steam-whistle under a bridge while a traveler was passing over

¹ *Hahn v. R. R. Co.*, 51 Cal. 605; *Culp v. R. R. Co.*, 17 Kan. 475; *Borst v. R. R. Co.*, 4 Hun. 346; *Hill v. R. R. Co.*, 55 Me. 438; 92 Am. Dec. 601; *Manchester etc. R. R. Co. v. Fullerton*, 14 Com. B., N. S., 53; *Pennsylvania etc. R. R. Co. v. Barnett*, 59 Pa. St. 259; *Billman v. R. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Gibbs v. R. R. Co.*, 26 Minn. 427; *Stamm v. R. R. Co.*, 1 Abb. N. C. 438; *Chicago etc. R. R. Co. v. Dunn*, 52 Ill. 451; 4 Am. Rep. 606.

² *Toledo etc. R. R. Co. v. Harmon*, 47 Ill. 298; 95 Am. Dec. 489; *Nashville etc. R. R. Co. v. Starnes*, 9 Heisk. 25; *Philadelphia etc. R. R. Co. v. Stinger*, 78 Pa. St. 219, the court saying: "What is proper care cannot be determined by any fixed rule of law. It must depend upon the facts of the particular case. That which would be due care in running a train through a sparsely settled rural district might be negligence, if not actual recklessness, in approaching a large city. The steam-whistle is one of the recognized methods of signaling the approach of a train. Its universal use upon railroads is a strong argument in favor of its efficiency. It is shrill and piercing; can be heard for a great distance, and can be mistaken for nothing else. Yet it has disadvantages. More than all other sounds, it is a terror to animals unaccus-

tomed to its warning. Where trains are passing through the built-up portions of towns and cities, it is not needed nor often used. In such cases they move slowly, and the ringing of a bell sufficiently answers the purposes of an alarm, and is not so likely to frighten horses. But where it is necessary to warn crossings or bridges at a distance in advance of the train, no sufficient substitute has yet been found for the whistle. It can be heard in any condition of wind and weather. In the absence of the discovery of any suitable substitute, and in view of its use upon all roads operated by steam, the mere fact of the whistling furnishes no presumption of negligence. Was the whistle used in such a wanton manner as to amount to negligence? The learned judge left this question to the jury, and in so far he was right."

³ *Hill v. R. R. Co.*, 55 Me. 438; 92 Am. Dec. 601; *Philadelphia etc. R. R. Co. v. Stinger*, 78 Pa. St. 219. The plaintiff may show that the sound of the whistle frightened other horses at the same time and place, and also show the usual effect of that whistle on ordinary horses at the same place: *Hill v. R. R. Co.*, 55 Me. 438; 92 Am. Dec. 601.

⁴ *Stamm v. R. R. Co.*, 1 Abb. N. C. 438; *Petersburg etc. R. R. Co. v. Hite*, 81 Va. 767.

it;¹ suddenly to emit from an engine standing near a crossing an increased quantity of steam, so as to frighten a traveler's horses after the flag-man on duty has beckoned him to cross;² to blow off the mud-cocks of an engine at a crossing where there is great traffic, and teams wait until the gates are opened;³ to unnecessarily and wantonly sound a whistle near a highway.⁴ But the following have been held not negligence, viz.: To omit to erect barriers to prevent the horses of travelers from taking fright while traveling on a turnpike owned by the railway company, running nearly parallel with the railway and near to it;⁵ the sounding of a whistle by an engineer when he first sees a team on the track, though the horse be thereby frightened and contribute to the injury.⁶ But where by statute railroads are required to give signals at crossings, an omission to do this, whereby a person is not able to secure his horse, and it takes fright at the passing train, renders the railroad liable.⁷

ILLUSTRATIONS. — An express train went towards a bridge without sounding the usual whistle at a post one hundred yards distant. A traveler, not aware that a train was approaching, drove upon the bridge. While upon the bridge, the train passed under it, and in passing under it the steam-whistle was sounded, whereat the traveler's horse took fright and ran away, and he was injured. *Held*, that whether the railroad company was negligent in not sounding the whistle on approaching the bridge was properly submitted to the jury, and a judgment for damages was affirmed: *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346. A railway train was standing at a highway crossing, divided so as to leave a space twenty-five feet wide for travelers to pass through, its cars occupying some of

¹ *Pennsylvania etc. R. R. Co. v. R. R. Co. v. Upton*, 18 Ill. App. Barnett, 59 Pa. St. 259; 98 Am. Dec. 346.

² *Borst v. R. R. Co.*, 4 Hun, 346.

³ *Manchester etc. R. R. Co. v. Fullarton*, 14 Com. B., N. S., 353.

⁴ *Billman v. R. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Pennsylvania etc. R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346; *Georgia etc. R. R. Co. v. Carr*, 73 Ga. 557; *Louisville etc.*

⁵ *Coy v. R. R. Co.*, 23 Barb. 643.

⁶ *Schaefer v. R. R. Co.* 62 Iowa, 624.

⁷ *Norton v. R. R. Co.*, 113 Mass. 366; *Wakefield v. R. R. Co.*, 37 Vt. 330; 86 Am. Dec. 711; *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346; *Cosgrove v. R. R. Co.*, 87 N. Y. 88; 41 Am. Rep. 355.

the highway. A traveler drove down with horse and wagon, and hesitated about crossing, but an employee of the company beckoned to him to come on. He drove quietly across and had reached the other side, when his horse, a gentle animal, took fright at a noise made by some of the train-men in shifting the brakes. The horse started to run, the traveler drew the reins tightly to hold him back, when one of them parted, so that in consequence of the strain on the rein the horse was turned to one side, the wagon turned over an embankment, and the occupants thrown out and the plaintiff's wife injured. *Held*, that a verdict against the company would be affirmed: *Pennsylvania R. R. Co. v. Horst*, 110 Pa. St. 221. A before crossing a track in his buggy stopped, looked, and listened. The view of the track being obstructed by weeds, he saw nothing, and a train came by without a whistle or warning, frightening A's horse, and throwing him out. *Held*, that A had a right of action: *Chicago etc. R. R. Co. v. McGaha*, 19 Ill. App. 342. W. was engaged in peddling kindling wood with a horse and wagon, in a city street, near a railroad crossing. The rails were laid without any planking or filling. While W. was very near the team soliciting a customer, an approaching train frightened the horse, and it ran partly across the track, but owing to the absence of planking or filling, the wheels of the wagon were prevented from crossing. W. instantly started in pursuit on the horse's running, and caught the horse on the track, and while there endeavoring to get it off the track, he was struck by the train and killed. The horse had not been tied, and W. was not holding him. There was a city ordinance forbidding any man to leave his horse in the street unless securely tied. The train was running at a rate forbidden by a city ordinance. *Held*, that a verdict in favor of W.'s representatives should be sustained: *Wasmer v. Delaware R. R. Co.*, 86 N. Y. 212; 36 Am. Rep. 608.

§ 1177. **Obstruction of Streets by Railroad Trains.**—The privilege given by statute or charter to railroads to place their tracks across highways gives them no right to obstruct the highway by standing cars or otherwise,¹ and they are liable for injury caused thereby.² The right to extend a switch track into a highway gives it no right to store its cars there, and it may be charged with negligence

¹ *State v. R. R. Co.*, 25 N. J. L. 437; *State v. R. R. Co.*, 59 Me. 189; *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; *McCoy v. R. R. Co.*, 5 Del. 529.
² *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; *R. R. Co. v. Decatur*, 33 Ill. 381.

at the suit of one who, while driving a pair of horses by, and sitting on top of the load, sustained an injury from being thrown from the team, the horses having taken fright at the cars standing there.¹ One sustaining special injury, as the inability to reach an appointment, from the neglect of a railroad company in permitting its cars to obstruct a highway for a longer time than that allowed by statute, may maintain an action.² If a railroad car is left at a crossing so near the traveled part of the highway that a wagon cannot pass without the wheels or whiffletrees coming in contact with the bumpers, it is an obstruction of the highway; and if it so obstructs the highway for a longer time than the statute allows, and frightens a horse attached to a wagon, which runs away and injures the driver, the company is liable in damages, provided the driver used due care, and the accident was not due to the vice of the horse.³ In a South Carolina case it appeared that a horse had broken loose from its fastenings, and had pursued its course along a highway towards its owner's house, until it came to a railroad crossing, and then, on account of a train of freight-cars which had remained standing upon the crossing since early in the evening, and which prevented the horse from passing, it wandered along the track of the railroad until about eleven o'clock, P. M., when the night passenger train came up and killed it. The court held that the obstruction of the public road was a wrong done by the company, which, under the circumstances, would have justly entitled the plaintiff to a recovery, even if the killing by the passenger train had been shown to be, so far as that train was concerned, wholly accidental and blameless.⁴ But the obstruction of a highway by a freight train standing across it is not the proximate cause of the injury which

¹ *Bussian v. R. R. Co.*, 56 Wis. 325.

² *Patterson v. R. R. Co.*, 56 Mich. 172.

³ *Peterson v. R. R. Co.*, 64 Mich. 621.

⁴ *Murray v. R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219.

a driver, who is waiting to get across the track, may suffer from having his horses frightened by a passing train while he is detained there.¹

ILLUSTRATIONS.—Plaintiff in going to his business found a train of cars across the street. Having waited some minutes and the train not moving, he endeavored to cross the track by climbing between the cars, when the train was started without warning or notice, and he was injured. *Held*, that his conduct did not prevent his recovery of damages: *Spencer v. R. R. Co.*, 4 Mackay, 138; 54 Am. Rep. 269.

§ 1178. Street-car Companies.—Injuries to Travelers.

—A person walking or driving on a horse-car track is not a trespasser.² The street-car company has not an exclusive right to the track; it has simply the right of way.³ A street-railway company in running its cars is obliged to use towards strangers on the streets, not the high care of a carrier towards his passengers, but the care of the driver of any vehicle,—that is to say, ordinary care;⁴ though there are cases holding it to the highest

¹ *Selleck v. R. R. Co.*, 58 Mich. 195.

² *Shea v. R. R. Co.*, 44 Cal. 414; *Lynam v. R. R. Co.*, 114 Mass. 83, the court saying: "The cases relating to injuries suffered by being struck by a locomotive-engine at a railroad crossing afford no test of the degree of care required of the plaintiff in this case. The cars of a horse-railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not, therefore, bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other."

³ *Adolph v. R. R. Co.*, 11 Jones & S. 199; 65 N. Y. 554; *Shea v. R. R. Co.*, 44 Cal. 428; *Albert v. R. R. Co.*, 2 Daly, 389; *Cohen v. R. R. Co.*, 69 N. Y. 170; 8 Jones & S. 368; *Mentz v. R. R. Co.*, 3 Abb. App. 274; 2 Rob. (N. Y.) 356; *Barksdull v. R. R. Co.*, 23

La. Ann. 180; *Railroad Co. v. Gladmon*, 15 Wall. 401. Some cases hold to the view that the railroad has the exclusive right: *Hegan v. R. R. Co.*, 15 N. Y. 380; *Wilbrand v. R. R. Co.*, 3 Bosw. 314; *Barker v. R. R. Co.*, 4 Daly, 274; *Johnson v. R. R. Co.*, 27 La. Ann. 53. While it has been held, on the other hand, that the right of the citizen is paramount: *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70. The rule as stated in the text, however, seems the best supported.

⁴ *Pendleton etc. R. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton etc. R. R. Co. v. Stallman*, 22 Ohio St. 1, 26; *Baltimore etc. R. R. Co. v. McDonnell*, 43 Md. 534-553; *Gilligan v. R. R. Co.*, 1 E. D. Smith, 453, 457; *Gumb v. R. R. Co.*, 53 N. Y. Sup. Ct. 466. *Unger v. R. R. Co.*, 51 N. Y. 497, the court saying: "It is argued that a street-railway company is bound to adopt every improvement, and to use every precaution, for the purpose of meeting an unforeseen occurrence, and preventing injuries to travelers upon the streets as well as passengers in the

degree of care and vigilance.¹ Thus if the horses of a street-car company break loose from a car and injure a traveler, in the absence of other inculpatory evidence the company will be discharged from liability by showing that the horses were coupled to the car, not by the most secure method possible, but by the method then in general use among such companies.²

The following have been held to amount to negligence in the driver, or those in charge of the car, viz.: For the driver to be looking back instead of forward;³ to allow his attention to be distracted by the appearance of a young lady at a street-door,⁴ or to gaze at a fire in the neighborhood;⁵ or to wind the lines about the brake, and sit down to examine a pigeon;⁶ or to turn his face away from his horse, to engage in conversation upon private matters with a friend upon the platform;⁷ or not to have the lines

cars; and he seeks to apply the same rule as to diligence and care which has in many cases been applied to railway companies whose cars are drawn by steam in the construction of their cars with the view to the safety of passengers therein. The argument is clearly unsound. The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies, whose cars are drawn by steam at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger, from their hazardous mode of conveyance, to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage-coaches, and for the same reason is not required from the carriers of passengers upon street-cars drawn by horses. It would be a very hard and unwise rule which would require of the owner of every vehicle driven in the streets of a city that he

use, in the construction of his carriage, and in the harness of his horses, and all the means by which they are attached to the vehicle, the best methods which human skill and ingenuity have contrived and brought into use, to prevent accidents to pedestrians in the streets. Such a rule has not been, and probably never will be, adopted."

¹ *Liddy v. R. R. Co.*, 40 Mo. 506; *Johnson v. R. R. Co.*, 20 N. Y. 65. A street-railway company is bound to exercise the highest degree of diligence to discover and avoid injuring a young child on its track: *Galveston City R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32.

² *Unger v. R. R. Co.*, 51 N. Y. 497.

³ *Collins v. R. R. Co.*, 142 Mass. 301; 56 Am. Rep. 675.

⁴ *Baltimore etc. R. R. Co. v. McDonnell*, 43 Md. 534, 553.

⁵ *Commonwealth v. R. R. Co.*, 107 Mass. 236.

⁶ *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; 36 Barb. 230.

⁷ *Mentz v. R. R. Co.*, 3 Abb. App. 274; affirming 2 Rob. (N. Y.) 356; *Oldfield v. R. R. Co.*, 14 N. Y. 310; 3 E. D. Smith, 103.

and brake under his control;¹ or not to check the speed at crossings, especially at night;² or to attempt to pass a vehicle which he sees dangerously close;³ or to drive at a rate of speed forbidden by a city ordinance;⁴ or the starting up of the horses in a city street while the driver is inside collecting fares;⁵ or not to exhibit lights on its cars at night, to notify persons of their approach.⁶ But not to look at a passenger getting aboard;⁷ nor not to stop because a person is approaching the track;⁸ nor to look at one side of the car at a dangerous object, though there may be imminent danger on the other;⁹ nor not to keep a lookout for danger after the car has passed.¹⁰ When the accident takes place on account of defective machinery on the car, it is no defense to the company which supplied the driver and horses that the car was owned by another company.¹¹ An ordinance that conductors of cars shall stop them and cross the tracks of steam-railroads in advance of them, under a penalty, has no application to cars where the same person acts as conductor and driver.¹²

ILLUSTRATIONS. — A, while drunk, lay down on a street-car track, and the driver of the car, though seeing an object which he thought to be a bundle of grain, made no effort to stop his car, in which he could have easily succeeded, but drove directly over A, and so killed him. *Held*, that the company was liable: *Werner v. R. R. Co.*, 81 Mo. 368. The driver of a street-car observing a woman driving in a buggy ahead, and being able to stop the car in time for the buggy to pass out of danger, nevertheless drove at an extraordinary speed, and crowding the buggy into a narrow space between a sand-bank and the track,

¹ *Pendril v. R. R. Co.*, 2 Jones & S. 483; 43 How. Pr. 399.

² *West Phila. R. R. Co. v. Mulhair*, 7 Rep. 661.

³ *Albert v. R. R. Co.*, 2 Daly, 389; *Coben v. R. R. Co.*, 8 Jones & S. 368; 69 N. Y. 170.

⁴ *Hanlon v. R. R. Co.*, 129 Mass. 301.

⁵ *Saare v. R. R. Co.*, 20 Mo. App. 211.

⁶ *Shea v. R. R. Co.*, 44 Cal. 414; *Johanson v. R. R. Co.*, 20 N. Y. 65.

⁷ *Citizens' etc. R. R. Co. v. Carey*, 56 Ind. 396.

⁸ *Phila. etc. R. R. Co. v. Henrice*, 92 Pa. St. 431; 37 Am. Rep. 699.

⁹ *Boland v. R. R. Co.*, 36 Mo. 484.

¹⁰ *Lawrence v. R. R. Co.*, 1 Cin. Rep. 180.

¹¹ *Weyant v. R. R. Co.*, 3 Duer, 360; *Jetter v. R. R. Co.*, 2 Keyes, 154.

¹² *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91.

struck and injured it. *Held*, that the company was liable: *Citizens' Street R. R. Co. v. Steen*, 42 Ark. 321. The horses attached to a street-car, after pulling it part way up a ferry-drop, stopped, and the driver applied the brake and held the car stationary. C., who was driving a wagon with two horses attached to it, was about ten feet behind the car when it started, and followed after it, and another team followed him. The defendants usually had an extra horse to help to pull the car up the drop, but on this occasion there was none. The driver of the car, not being able to stop the car, it came back upon the horses of C., and injured them, C. being unable to get out of the way. In an action against the railway company, *held*, that the company was liable: *Cook v. R. R. Co.*, 98 Mass. 361. A child two years old ran across the track of a horse-railroad company, and was run over and killed by one of their cars. By-standers shouted to the driver to stop, but his attention was turned in another direction. He was driving slowly and cautiously. *Held*, that the company was not liable: *Boland v. R. R. Co.*, 36 Mo. 484. A man on horseback, riding near a horse-car, fell on the track in front of the car, which ran over him. *Held*, that if the driver was not at his brakes and horses, where he might have stopped the car, but inside the car, this was negligence imputable to the car company: *Brooks v. R. R. Co.*, 22 Neb. 816.

§ 1179. **Street-cars — Contributory Negligence of Traveler.** — It has been held contributory negligence to attempt to get on a car from the space between two tracks on seeing another car approach on a parallel track;¹ the attempt by the driver of a vehicle to pass between an approaching car and a wagon at the curb;² to drive a team so near to a street-car track that it is struck by a passing car;³ and where a pedestrian, in the night-time, overcome by the influence of liquor, falls, in a drunken stupor, upon the track of a street-railway company, and is afterwards run over and killed by a passing car, the company is not liable, unless the driver of the car, after the deceased was discovered, could, by the exercise of reasonable care and prudence, have prevented the accident.⁴ It is negligence

¹ *Halpin v. R. R. Co.*, 8 Jones & S. 175. ³ *Spaulding v. Jarvis*, 32 Hun, 621.

² *Barker v. R. R. Co.*, 4 Daly, 274; ⁴ *Button v. R. R. Co.*, 18 N. Y. Mercier v. R. R. Co., 23 La. Ann. 264. 248.

to drive upon a street-railway without looking around, and it is unlawful to drive along such track and willfully obstruct the cars.¹ It is the duty of a traveler upon a street on which is a street-railway to listen to whatever signal there may be from an approaching car, and to look behind him from time to time, so that if the car is near he may turn off and allow it to pass without undue slackening of ordinary speed.² The driver of a vehicle is not bound to guard against an unlooked for movement of a street-car which he is following at a reasonably safe distance behind; as where the plaintiff was following a street-car full of passengers up a steep ascent, and the car, through the carelessness of the driver, suddenly slid backwards upon the plaintiff's horses, which were about twenty feet behind, and injured them, in spite of the best efforts of the plaintiff to get them out of the way.³ When a vehicle and a railway-car are going side by side in the same direction, with a clear space of nearly two feet between them, in case of a collision the presumption of negligence is altogether against the driver of the cart, and not against that of the car; for the reason that the former can deviate from the track, while the latter cannot.⁴ But a pedestrian is not negligent in not anticipating an accident which may leave him helpless, and is not bound to refrain from crossing the track because a car is likely to strike him in case he should fall on the track by some such accident, and lie there, unable to rise; because such a result is out of the usual course of events, and not such as the pedestrian is bound, in the exercise of ordinary care, to anticipate and provide for;⁵ nor is it negligence *per se* not to look both ways and listen, as in the

¹ Wood v. R. R. Co., 52 Mich. 402; 50 Am. Rep. 259; Jatho v. R. R. Co., 375.

⁴ Phila. 24.

² Adolph v. R. R. Co., 76 N. Y. 530.

³ Cook v. R. R. Co., 98 Mass. 361.

⁴ Suydam v. R. R. Co., 41 Barb. 375.

⁵ Mentz v. R. R. Co., 3 Abb. App. 274; 2 Rob. (N. Y.) 356; Baxter v. R. R. Co., 30 How. Pr. 219; 3 Rob. (N. Y.) 510.

case of steam-railroads.¹ Where a man marching in a procession is run into by a street-car, the same rule of contributory negligence applies as in the case of an ordinary traveler on the street.²

ILLUSTRATIONS.—Plaintiff, while engaged in running a telegraph-wire across a street where the company had no legal right to run wires, was thrown from a pole by a passing street-car, which caught the slack of the wire. *Held*, that plaintiff was a wrong-doer, and could not recover from the street-car company: *Banks v. R. R. Co.*, 136 Mass. 485. A woman crossed a street-railroad track, leading a child. The child's foot caught in a hole by the track, and before it could be extricated, it was run over by a car which was going rapidly, and had a defective brake. There was time to have crossed in safety but for the accident. *Held*, that the company were liable: *Aaron v. R. R. Co.*, 2 Daly, 127.

§ 1180. **Railroad Crossing — Rights of Public and Railroad — Liability of Railroad for Injuries.** — Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross, but the traveler must yield the right of way to an approaching train.³ The obligations of railroads and travelers on highways are mutual, the same degree of care being required of each.⁴ A person has the right to cross a railroad at a crossing anywhere within the highway, even if a foot-walk has been made across the railroad.⁵ Where a railroad track is laid along a public street, a traveler has a right to cross it at any point.⁶ To hold the railroad re-

¹ *Lynam v. R. R. Co.*, 114 Mass. 83; *Mentz v. R. R. Co.*, 2 Rob. (N. Y.) 356; 3 Abb. App. 274. *Contra*, *Kelly v. Hendrie*, 26 Mich. 255.

² *Brown v. R. R. Co.*, 50 N. Y. Sup. Ct. 106.

³ *Black v. R. R. Co.*, 38 Iowa, 515; *Madison etc. R. R. v. Taffe*, 37 Ind. 361, 364; *Pennsylvania R. R. Co. v. Krick*, 47 Ind. 368, 371; *Chicago etc. R. R. Co. v. Hatch*, 79 Ill. 137; *Illinois etc. R. R. Co. v. Benton*, 69 Ill. 174; *Leavenworth etc. R. R. Co. v. Rice*, 10 Kan. 426; *Warner v. R. R.*

Co., 44 N. Y. 465; *North Pa. R. R. Co. v. Heileman*, 49 Pa. St. 60; 88 Am. Dec. 482; *Ohio etc. R. R. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638.

⁴ *Indianapolis etc. R. R. Co. v. McLin*, 82 Ind. 435.

⁵ *Louisville etc. R'y Co. v. Head*, 80 Ind. 117.

⁶ *Baltimore etc. R. R. Co. v. Fitzpatrick*, 35 Md. 32; *Paducah etc. R. R. Co. v. Hoehl*, 12 Bush, 50. And see also *Matze v. R. R. Co.*, 1 Hun, 417.

sponsible for an injury to a traveler at a highway, it is not enough that the casualty occurred without any negligence on the part of either,¹ but some negligence on the part of the railroad must be shown.² It is not essential that the road shall be formally located and accepted as a public road; it is sufficient that it has been used as such with the consent, express or implied, of the owner.³ The company is liable for an injury occasioned to a traveler by a want of repair in the approaches to the crossing.⁴

ILLUSTRATIONS. — A railroad company left an unnecessarily large space between the rail and a plank placed beside it to facilitate the crossing by teams. *Held*, liable to the owner of a horse fatally injured by catching therein and wrenching off one of his hoofs: *Cuddeback v. Jewett*, 20 Hun, 187. A railroad train rounded a curve in the road, a heavily loaded wagon with horses attached was in full view a few hundred feet distant and stationary across the track. The engineer saw the wagon in time to stop the train and avoid a collision, but did not immediately take measures to do so, thinking that the wagon would be removed. The wagon could not be removed in time, and the train ran into it, injuring it and the horses. *Held*, that the company was liable: *Chicago etc. R. R. Co. v. Hogarth*, 38 Ill. 370. A railroad constructed its road across the main street of a village about a foot and a half above the level of the street. The street was twelve rods wide, with two traveled paths, one on each side of the street, and an open common between. The company was required by its charter to restore any highway intersected so as not to impair its usefulness. The company put the two traveled tracks in proper condition for passing with vehicles, but made no other crossing. About midway between the two paths they constructed a culvert under the timbers of the track, to let the water accumulating from rains pass through, which was left

¹ *Cosgrove v. R. R. Co.*, 13 Hun, 329; *Rothe v. R. R. Co.*, 21 Wis. 256; *Schwartz v. R. R. Co.*, 4 Robt. 347; *Altreuter v. R. R. Co.*, 2 E. D. Smith, 151; *Zeigler v. R. R. Co.*, 5 S. C. 221; *Evansville R. R. Co. v. Lowdermilk*, 15 Ind. 121.

² *Com. v. R. R. Co.*, 101 Mass. 201; *Schwartz v. R. R. Co.*, 4 Robt. 347. It is answerable to one who becomes fastened upon its track in the streets of a city because of negligence in the construction of such track, and who

while so fastened is injured by an approaching train, though the employees of the company did not see him nor know of his helpless condition: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155.

³ *Pittsburgh etc. R. R. Co. v. Dunn*, 56 Pa. St. 280, 284; *Webb v. R. R. Co.*, 57 Me. 117. See *Sweeny v. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644; *Delaney v. R. R. Co.*, 33 Wis. 67.

⁴ *Maltby v. R. R. Co.*, 52 Mich. 108.

uncovered. A person walking across the street upon the railroad track, at a time when the culvert was filled with snow, and could not be seen, fell into it, and was injured. *Held*, that the railroad company was liable for the injury: *Judson v. R. R. Co.*, 29 Conn. 434.

§ 1181. **Degree of Care Required of Railroad—In General.**—In the absence of a statute prescribing the degree of care to be exercised at crossings, railroad companies are bound to exercise a degree of skill, prudence, and care in proportion to the danger. A less degree of care is required than in the carriage of a passenger, for there is no contract relation between the company and a traveler. In case of a collision at a crossing, the company is exonerated where it uses such reasonable care to avoid the collision as ordinary prudence would suggest.¹ And what that care shall be must depend upon the circumstances of each case.² A greater degree of vigilance is required at street crossings in a populous city than at the crossings of a country road.³ The fact that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule, are proper for the jury to consider, with other circumstances, as bearing on the question of negligence.⁴

ILLUSTRATIONS.—Plaintiff, while on the station platform, was struck by a construction train of peculiar build. He had stepped back far enough to avoid an ordinary train. *Held*, that he had a right of action against the railroad company: *Sullivan v. R. R. Co.*, 39 La. Ann. 800. A railroad track was laid in a public street. A traveler caught his foot in an opening negligently left in the track, and was struck by a train which was negligently managed. *Held*, that the railroad company was liable: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59.

¹ *Baltimore etc. R. R. Co. v. Breinig*, 25 Md. 378; 90 Am. Dec. 49; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570; *Brand v. R. R. Co.*, 8 Barb. 368; *Willoughby v. R. R. Co.*, 37 Iowa, 432.

² *Madison etc. R. R. Co. v. Taffe*, 37 Ind. 361; *State v. R. R. Co.*, 52 N. H. 528.

³ *Chicago etc. R. R. Co. v. Gretzner*, 46 Ill. 74, 84; *St. Louis etc. R. R. Co. v. Dunn*, 78 Ill. 197; *Lafayette etc. R. R. Co. v. Adams*, 26 Ind. 76; *Paducah etc. R. R. Co. v. Hoehl*, 12 Bush, 41, 45; *Pennsylvania R. R. Co. v. Krick*, 47 Ind. 368, 371.

⁴ *Marcott v. R. R. Co.*, 47 Mich. 1.

§ 1182. **Rate of Speed.** — Unless restrained by statute or ordinance, railroad companies may run their trains at the highest speed consistent with the safety of passengers and freight.¹ Hence no rate of speed of a railroad train is negligence *per se*.² But circumstances may require a less rate of speed,³ and hence, even in the absence of a statute, running at a very great speed over crossings may be evidence of negligence.⁴ And so however slow a train may be moving, if its speed might have been still further reduced and a collision thus avoided, the company may be chargeable with negligence in not further reducing the speed.⁵ There is no obligation on a railroad train going through the country, in the absence of special circumstances, to slacken its speed at crossings, or because of the approach on the road of vehicles.⁶ Nor are those in charge of railway trains, when they see a traveler approaching, under any obligation to stop the train in anticipation of his attempting to cross. Where the traveler has a fair view of the train, and the usual and customary or the statutory signals are made to give warning of its approach, the company's servants have a right to presume that they will be observed.⁷ It is negligence in a railroad

¹ Chicago etc. R. R. Co. v. Givens, 18 Ill. App. 404. It is not an engineer's duty to reverse the engine, if the train is moving so fast that to do so would endanger the lives of the passengers, although a collision might thereby be averted: Nashville etc. R. R. Co. v. Troxlee, 1 Lea, 520.

² Young v. R. R. Co., 79 Mo. 336; Main v. R. R. Co., 18 Mo. App. 388; Cohen v. R. R. Co., 14 Nev. 376; Stepp v. R. R. Co., 85 Mo. 229; Garland v. R. R. Co., 8 Ill. App. 571; Shackelford v. R. R. Co., 84 Ky. 43; 4 Am. St. Rep. 189.

³ Reading etc. R. R. Co. v. Ritchie, 102 Pa. St. 425; Duffy v. R. R. Co., 19 Mo. App. 380; Terry v. Jewett, 78 N. Y. 338; East Tenn. R. R. Co. v. Deaver, 79 Ala. 216.

⁴ Artz v. R. R. Co., 44 Iowa, 234; Black v. R. R. Co., 38 Iowa, 515;

Massoth v. Canal Co., 64 N. Y. 531; Warner v. R. R. Co., 44 N. Y. 465; Indianapolis etc. R. R. Co. v. Stables, 62 Ill. 313; Chicago etc. R. R. Co. v. Payne, 59 Ill. 534; Rockford etc. R. R. Co. v. Hillmer, 72 Ill. 235; Wilds v. R. R. Co., 29 Ill. 315; Reeves v. R. R. Co., 30 Pa. St. 454; 72 Am. Dec. 713; Murray v. R. R. Co., 10 Rich. 227; 70 Am. Dec. 219.

⁵ Neier v. R. R. Co., 12 Mo. App. 35.

⁶ Chicago etc. R. R. Co. v. Harwood, 80 Ill. 88; Zeigler v. R. R. Co., 5 S. C. 221; 7 S. C. 402.

⁷ St. Louis etc. R. R. Co. v. Manly, 58 Ill. 300; Chicago etc. R. R. Co. v. Harwood, 80 Ill. 88; Chicago etc. R. R. Co. v. Damerell, 81 Ill. 450; Frazer v. R. R. Co., 81 Ala. 185; 60 Am. Rep. 145.

not to be equipped with brakes and other means of stopping the train which other railroads use.¹ So it is negligence to detach a car on a railroad track where persons are liable to be found, and send it out of sight around a curve on a down grade, unattended by any one capable of checking it in case of danger.² The rules of a railroad company regulating the distance at which trains shall run from each other are intended solely for the protection of the property of the company and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of the trains, in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing.³ If, without any defect in the head-light or fault on the part of the employees, the light becomes by rain or other natural causes so obscured that the lookout cannot see ahead, the railroad company is not necessarily liable for consequent damages. Instances may occur in which danger from collision may imperatively demand that the train proceed at all events; and it would be difficult to lay down any rule by which it may be determined how far ahead the light should be thrown to make it lawful for the train to run.⁴ It is gross negligence in the company to run their trains at greater speed than prescribed by statute or municipal ordinance,⁵ although before the passage of the ordinance the road was built on a grade and curve which render it impracticable to comply with the ordinance.⁶ And the company is liable for injury done when the speed has been exceeded, though at the instant of collision the speed is within the prescribed

¹ *Costello v. R. R. Co.*, 65 Barb. 92.

² *Kay v. R. R. Co.*, 65 Pa. St. 269;
3 Am. Rep. 628.

³ *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 545.

⁴ *Louisville etc. R. R.-Co. v. Melton*, 2 Lea, 262.

⁵ *Chicago etc. R. R. Co. v. Becker*, 84 Ill. 483; *St. Louis etc. R. R. Co. v. Dunn*, 78 Ill. 197; *Karle v. R. R. Co.*, 55 Mo. 476; *Massoth v. Canal Co.*, 64 N. Y. 524; *Correll v. R. R. Co.*, 38 Iowa, 120; 18 Am. Rep. 22.

⁶ *Neier v. R. R. Co.*, 12 Mo. App. 25.

limit.¹ But the prohibited speed, if not the efficient cause of the injury complained of, will not render the company liable for such injury.² A statute requiring the checking of trains at road crossings applies as well to the crossings of streets in cities.³ So one limiting the speed of railroad trains in the city will not be construed as applying only to those portions of the city used by the public.⁴ An ordinance forbidding the running of trains at a greater speed than ten miles an hour within the city limits does not license trains to run at this rate. The trains must still conform their rate of speed to the safety of the public.⁵ Under a statute making a railroad liable for damages done to person or property by a train, engine, or car run through a municipality at too great a rate of speed, the company may be liable where the engine or train does not come in contact with a team, but frightens the horses attached thereto so that they run away, injuring the owner in his person and property.⁶

§ 1183. Duty of Railroad to Give Warning—Whistling or Ringing Bell.—Where by statute or municipal ordinance the railroad is required on approaching a crossing to ring a bell or sound a whistle, the omission to do so is negligence rendering the company liable,⁷ provided

¹ New Orleans etc. R. R. Co. v. Toulmé, 59 Miss. 284.

² Evans etc. Brick Co. v. R. R. Co., 17 Mo. App. 624.

³ Central R. R. Co. v. Russell, 75 Ga. 810.

⁴ Crowley v. R. R. Co., 65 Iowa, 658.

⁵ Wabash R. R. Co. v. Henks, 91 Ill. 406.

⁶ Chicago etc. R. R. Co. v. People, 120 Ill. 667; 24 Ill. App. 562.

⁷ Chicago etc. R. R. Co. v. McKean, 40 Ill. 218; St. Louis etc. R. R. Co. v. Terhune, 50 Ill. 151; 99 Am. Dec. 504; Chicago etc. R. R. Co. v. Fears, 53 Ill. 115; Galena etc. R. R. Co. v. Loomis, 13 Ill. 548; 56 Am. Dec. 471; Chicago etc. R. R. Co. v. Reid, 24 Ill.

144; Indianapolis etc. R. R. Co. v. Stables, 62 Ill. 313; Chicago etc. R. R. Co. v. Notzki, 66 Ill. 455; Peoria etc. R. R. Co. v. Siltman, 67 Ill. 72; Chicago etc. R. R. Co. v. Bell, 70 Ill. 102; Artz v. R. R. Co., 34 Iowa, 153; Commonwealth v. R. R. Co., 10 Allen, 189; Fletcher v. R. R. Co., 64 Mo. 484; Georgia etc. R. R. Co. v. Wynn, 42 Ga. 331; Galena etc. R. R. Co. v. Dill, 22 Ill. 264; Baltimore etc. R. R. Co. v. State, 29 Md. 252; 96 Am. Dec. 528; O'Mara v. R. R. Co., 38 N. Y. 445; 98 Am. Dec. 61; Cincinnati etc. R. R. Co. v. Butler, 103 Ind. 31; Huckshold v. R. R. Co., 90 Mo. 548; Houston etc. R. R. Co. v. Wilson, 60 Tex. 142.

the failure of duty is the proximate cause of the injury,¹ and they are not able to show that the omission was reasonable and prudent.² This statutory obligation imposes a duty upon railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train;³ as, for example, persons traveling on a parallel highway as well as those intending to cross the track.⁴ But the failure to give signals elsewhere than at public places or at public crossings does not constitute negligence as to those who as trespassers may be crossing or using the track.⁵ And the employment of statutory signs and signals will not excuse the company if its servants are otherwise negligent.⁶ Other precautions may be required in some localities and under some circumstances.⁷ It is negligent to run trains so near together at a highway crossing as to

¹ *Thompson on Negligence*, 420; *Bilbee v. R. R. Co.*, 18 Com. B., N. S., 584; *Cosgrove v. R. R. Co.*, 13 Hun, 329; *Stackus v. R. R. Co.*, 7 Hun, 559; *Havens v. R. R. Co.*, 41 N. Y. 296; *Fletcher v. R. R. Co.*, 64 Mo. 484; *Illinois etc. R. R. Co. v. Benton*, 69 Ill. 174; *Linfield v. R. R. Co.*, 10 Cush. 562; 57 Am. Dec. 124; *Chicago etc. R. R. Co. v. Notzki*, 66 Ill. 455; *Peoria etc. R. R. Co. v. Siltman*, 67 Ill. 72; *Cook v. R. R. Co.*, 5 Lans. 401; *Commonwealth v. R. R. Co.*, 120 Mass. 372; *Chicago etc. R. R. Co. v. Van Patten*, 74 Ill. 91; *Cordell v. R. R. Co.*, 70 N. Y. 119; 26 Am. Rep. 550; *Wilcox v. R. R. Co.*, 39 N. Y. 358; 100 Am. Dec. 440; *Nicholson v. R. R. Co.*, 41 N. Y. 525; *Baxter v. R. R. Co.*, 41 N. Y. 502; *Gorton v. R. R. Co.*, 45 N. Y. 660; *Calligan v. R. R. Co.*, 59 N. Y. 651; *Parker v. R. R. Co.*, 86 N. C. 224. But see *Reeves v. R. R. Co.*, 30 Pa. St. 454; 72 Am. Dec. 713; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 71; 78 Am. Dec. 322; *Madison etc. R. R. Co. v. Taffe*, 37 Ind. 361, 376; *Commonwealth v. R. R. Co.*, 10 Allen,

189; *Ernst v. R. R. Co.*, 39 N. Y. 61, 67; 100 Am. Dec. 405; *St. Louis etc. R. R. Co. v. Dunn*, 78 Ill. 197; *Kenayde v. R. R. Co.*, 45 Mo. 255; *Correll v. R. R. Co.*, 38 Iowa, 120; 18 Am. Rep. 22; *Philadelphia etc. R. R. Co. v. Stebbin*, 62 Md. 504; *Missouri Pacific R. R. Co. v. Pierce*, 33 Kan. 61.

² *Wakefield v. R. R. Co.*, 37 Vt. 330; 86 Am. Dec. 711.

³ *Wakefield v. R. R. Co.*, 37 Vt. 330; 86 Am. Dec. 711.

⁴ *Ransom v. R. R. Co.*, 62 Wis. 178; 51 Am. Rep. 718. *Contra*, *East Tennessee R. R. Co. v. Feathers*, 10 Lea, 103.

⁵ *Shackelford's Adm'r v. R. R. Co.*, 84 Ky. 43; 4 Am. St. Rep. 189.

⁶ *Bradley v. R. R. Co.*, 2 Cush. 539; *Linfield v. R. R. Co.*, 10 Cush. 562; 57 Am. Dec. 124; *Zimmer v. R. R. Co.*, 7 Hun, 552; *Cordell v. R. R. Co.*, 70 N. Y. 119; 26 Am. Rep. 550; *Weber v. R. R. Co.*, 58 N. Y. 451; 67 N. Y. 587; *Indiana etc. R. R. Co. v. Stables*, 62 Ill. 313; *Texas etc. R. R. Co. v. Lowry*, 61 Tex. 149.

⁷ *Dyer v. R. R. Co.*, 71 N. Y. 228.

make the statutory signals unavailing to warn travelers on the highway.¹ Statutes requiring signals to be given are for the benefit of travelers and strangers, and not for that of employees of the company.² So, in the absence of a statute, failure to whistle or give other signals at crossings is negligence.³ In this case the obligation to give signals or alarms of approaching trains depends upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to persons or property may be reasonably apprehended from a failure to give notice of an approaching train, it is the duty of the company to give such notice, and its failure to do so is negligence.⁴

ILLUSTRATIONS. — At a grade crossing where there were several tracks, and much switching was done in making up trains and distributing cars, no switchman was stationed until seven o'clock in the morning, although much of this work was done earlier than that. Plaintiff was driving, and upon reaching the crossing, he nearly but not quite stopped, and looked and listened for trains. His view of the farthest track was obstructed by cars standing on a nearer track, but he did not get out of his carriage. Proceeding to cross, a train coming upon the farthest track struck him. There was evidence that the train was running at unlawful speed, and that no signal was given. *Held*, that the company was liable: *Kelly v. R. R. Co.*, 29 Minn. 1. A railroad train struck a person in a city street. Owing to the position of another train the approaching train could not be seen. No bell was sounded, as required by the city ordinance. *Held*, that negligence was shown: *Cumming v. R. R. Co.*, 38 Hun, 362. At a crossing a woman was driving a steady horse which she was accustomed to drive; a train approached without complying with the statute requiring a bell or whistle to be sounded at least eighty rods from the crossing; although cautiously looking she did not see the train, owing to obstructions, until she was within three rods of the crossing, when she backed three rods, and the engine whis-

¹ *Chicago etc. R. R. Co. v. Boggs*, 101 Ind. 522; 51 Am. Rep. 761.

² *Evans v. R. R. Co.*, 62 Mo. 49.

³ *Indiana etc. R. R. Co. v. Stout*, 53 Ind. 143; *Pennsylvania R. R. Co. v. Krick*, 47 Ind. 369; *Chicago etc. R. R. Co. v. Still*, 19 Ill. 499; 71 Am.

Dec. 237; *Wabash etc. R. R. Co. v. Wallace*, 110 Ill. 114; *Lake etc. R. R. Co. v. Zoffinger*, 107 Ill. 199; *Loucks v. R. R. Co.*, 31 Minn. 526.

⁴ *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; 98 Am. Dec. 346.

ting at the crossing caused the horse to turn around and throw her out. *Held*, that the railroad was liable: *Voak v. R. R. Co.*, 75 N. Y. 320. Plaintiff's horse, driven by his servant with a load to be delivered at the railroad station, was frightened by the noise of a construction train, backed, and broke its neck. *Held*, that the company was not liable, although the station agent ordered the driver to back up to the station platform, the agent not knowing that the horse was timid, nor although the train, which had been backing up and down between blow-posts, did not sound a whistle: *Morgan v. R. R. Co.*, 77 Ga. 788. A city ordinance required that locomotives passing through the city should have a lookout in a certain position. Owing to changes in the plan of engines this became impracticable. *Held*, that a railroad was not chargeable with negligence in not complying with the ordinance: *Baltimore etc. R. R. Co. v. Mali*, 66 Md. 53.

§ 1184. **Evidence as to Giving of Signals.** — Where the evidence is conflicting as to whether the bell was rung or the whistle sounded at a crossing, and there is affirmative testimony that this duty was performed, and negative testimony by other witnesses that they did not hear it, the affirmative evidence of the fact should overcome the negative.¹ That the plaintiff did not hear the signal is no evidence that it was not given.²

§ 1185. **Gates at Crossings — Flag-men.** — Where by statutes gates are required to be erected at railroad crossing, the failure to do so is negligence,³ and the company will be liable, provided the omission was the proximate cause of the injury.⁴ It is generally held that it is not negligence on the part of a railroad to fail to maintain a watchman or flag-man at a crossing to warn travelers.⁵ In Missouri it is said that the railroad is not bound to this duty unless it is the custom of railroads to do so at simi-

¹ *Chapman v. R. R. Co.*, 14 Hun, 484; *Sutherland v. R. R. Co.*, 9 Jones & S. 17; *McGrath v. R. R. Co.*, 63 N. Y. 522; *Culhane v. R. R. Co.*, 60 N. Y. 133; 67 Barb. 562; *Telfer v. R. R. Co.*, 30 N. J. L. 188; *Chicago etc. R. R. Co. v. Still*, 19 Ill. 499; 71 Am. Dec. 236.

² *Ellis v. R. R. Co.*, L. R. 9 Com. P. 551.

³ *Williams v. R. R. Co.*, L. R. 9 Ex. 157.

⁴ *Penn. Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188.

⁵ *Kissenger v. R. R. Co.*, 56 N. Y. 538; *Sellars v. R. R. Co.*, 94 N. C. 654.

lar crossings.¹ In Iowa and Wisconsin the omission may be considered by the jury on the question of negligence.² In New York it is held error to leave the question whether or not the omission to have a flag-man was negligent to the jury.³ So the withdrawal or absence of a flag-man or watchman from a highway crossing where he is usually kept is negligence.⁴ Where a flag-man is employed at a crossing to warn travelers, his neglect to do so will render the company liable;⁵ and one injured by obeying the signals of the watchman may recover damages.⁶ He is bound to indicate to persons when it is safe for them to pass as well as when it is necessary or prudent for them to refrain from passing.⁷ As to one who, without right, is walking on a railroad right of way, the company owes no duty to provide a flag-man at a street crossing;⁸ and the flag-man himself cannot recover for an injury resulting from his failure to see approaching cars which it was his duty to observe.⁹ But it cannot be charged as a matter of law that one about to cross a railroad track was free from negligence because the flag-man beckoned him on.¹⁰ If he sees the danger, even the absence of the flag-man will not excuse his running into it.¹¹ If the traveler refuses to heed the signals, the railroad, unless grossly negligent, will not be liable;¹² but one need not take notice of unintelligible signals.¹³ Under a statute making a

¹ *Welsch v. R. R. Co.*, 72 Mo. 451; 37 Am. Rep. 440; *Ernst v. R. R. Co.*, 39 N. Y. 61; 100 Am. Dec. 405.

² *Hart v. R. R. Co.*, 56 Iowa, 166; 41 Am. Rep. 93; *Hoye v. R. R. Co.*, 67 Wis. 1.

³ *Houghkirk v. R. R. Co.*, 92 N. Y. 219; 44 Am. Rep. 370.

⁴ *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312; *Pittsburg etc. R. R. Co. v. Yundt*, 78 Ind. 373; 41 Am. Rep. 580; *Warner v. R. R. Co.*, 45 Barb. 299.

⁵ *Kissenger v. R. R. Co.*, 56 N. Y. 538; *Delaware etc. R. R. Co. v. Tofey*, 38 N. J. L. 525; *Dolan v. Delaware etc. Canal Co.*, 71 N. Y. 285; *Central Trust Co. v. R. R. Co.*, 27 Fed. Rep. 159.

⁶ *Sweeney v. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 645.

⁷ *Sweeney v. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 645.

⁸ *Chicago etc. R. R. Co. v. Eininger*, 114 Ill. 79.

⁹ *Clark v. R. R. Co.*, 128 Mass. 1.

¹⁰ *Chicago etc. R. R. Co. v. Spring*, 13 Ill. App. 174.

¹¹ *Pakalinsky v. R. R. Co.*, 82 N. Y. 424; *McGrath v. R. R. Co.*, 59 N. Y. 468; 17 Am. Rep. 359.

¹² *Harlan v. R. R. Co.*, 64 Mo. 480; 65 Mo. 22; *Wilds v. R. R. Co.*, 29 N. Y. 315.

¹³ *Chicago etc. R. R. Co. v. Notzki*, 66 Ill. 455.

railroad corporation liable for all damages sustained by reason of neglect to put up sign-boards at crossings, the failure to maintain a sign-board is conclusive evidence of negligence;¹ but the failure to erect a sign-board at a crossing, as required by law, does not render the company responsible for an accident happening to one who saw the track and attempted to cross it.² The jury are to decide whether the omission of a sign over a railroad crossing constitutes negligence, though there is no statute or ordinance requiring such sign, and the injured party was familiar with the crossing.³

§ 1186. **Dangerous Crossings — Obstructed View.** — Obstructions, either natural or artificial, which obscure passing trains from approaching travelers, demand of the employees of the company the exercise of increased vigilance; and where they are upon the right of way of the company, or are of its own construction, or exist by its permission, this is such negligence as may render it liable for injuries occurring at a crossing thus obscured.⁴ Where, from the peculiarity of construction of the crossing on account of the conformation of the land, the steepness of grades, or sharpness of curves, the danger is augmented, this imposes the duty of additional care on the part of the railroad and its employees.⁵ In crossing a public road it is the duty of the railroad company to restore the highway so as not to interfere materially with its usefulness.⁶ The following have been held to be negligence

¹ *Field v. R. R. Co.*, 14 Fed. Rep. 332.

² *Haas v. R. R. Co.*, 47 Mich. 401.

³ *Shaber v. R. R. Co.*, 28 Minn. 103.

⁴ *Dimick v. R. R. Co.*, 80 Ill. 338; *Artz v. R. R. Co.*, 44 Iowa, 284; 34 Iowa, 154; 38 Iowa, 293; *Ingersoll v. R. R. Co.*, 6 Thomp. & C. 415; *Illinois etc. R. R. Co. v. Benton*, 69 Ill. 174; *Indianapolis etc. R. R. Co. v. Smith*, 78 Ill. 112; *Ohio etc. R. R. Co. v. Clutter*, 82 Ill. 173; *Cordell v. R. R. Co.*, 70 N. Y. 119; 26 Am. Rep. 550; *Craig v. R. R. Co.*, 118 Mass. 431; *Penn. R. R.*

Co. v. Matthews, 36 N. J. L. 531; *Mackay v. R. R. Co.*, 35 N. Y. 75.

⁵ *Chicago etc. R. R. Co. v. Payne*, 59 Ill. 534, 540; 49 Ill. 499; *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Richardson v. R. R. Co.*, 45 N. Y. 846, 849; *Illinois etc. R. R. Co. v. Benton*, 69 Ill. 174; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Payne v. R. R. Co.*, 9 Hun, 526; *Reeves v. R. R. Co.*, 30 Pa. St. 454; 72 Am. Dec. 713.

⁶ *Duffy v. R. R. Co.*, 32 Wis. 269; *Roberts v. R. R. Co.*, 35 Wis. 679.

of this character, viz.: Permitting weeds to grow on the company's right of way to such a height as to prevent the traveling public from seeing approaching trains;¹ permitting corn-cribs to stand near its track, by reason of which the view of the crossing is cut off;² piling wood, and the erection of a building, so near the track as to render it impossible for one approaching on the highway to see a coming train in time to avoid a collision, even by the exercise of the greatest diligence;³ leaving one or more of its cars standing in the street, by which the view of the track in one direction is obstructed, so that a person crossing the track could not see a train approaching.⁴ So where the track of the road was obscured by timber, or by fog and smoke, even in the absence of a statute requiring audible signals, it was held incumbent upon the company to sound the whistle, and the failure to do so was evidence of negligence.⁵

ILLUSTRATIONS.—The track was raised at a crossing so as to render it difficult for loaded wagons to cross. The plaintiff endeavoring to cross, the wheels of his wagon sank so that he could not pass over the rails, and while thus detained, his wagon was struck by a passing train, and himself injured. *Held*, that the railroad was negligent in not so constructing the crossing as to render it convenient and practicable for loaded teams: *Milwaukee etc. R. R. Co. v. Hunter*, 12 Wis. 160; 78 Am. Dec. 699. The company had allowed the view of the track to be obstructed by a house and brush on its right of way, and the train, being behind time, was going at unusual speed, and the statutory signals of approach were not seasonably given. *Held*, that the company was liable, even if the deceased was negligent in listening or looking: *Chicago etc. R. R. Co. v. Lee*, 87 Ill. 454.

¹ *Indianapolis etc. R. R. Co. v. Smith*, 78 Ill. 112; *Ohio etc. R. R. Co. v. Clutter*, 82 Ill. 123; *Chicago etc. R. Co. v. Lee*, 87 Ill. 454.

² *Rockford etc. R. R. Co. v. Hillmer*, 72 Ill. 235.

³ *Mackay v. R. R. Co.*, 35 N. Y. 75.

⁴ *McGuire v. R. R. Co.*, 2 Daly, 76; *Thomas v. R. R. Co.*, 19 Blatchf. 533.

But *after*, where the obstruction is a moving train, which in an inconsiderable space of time would have passed: *Hamm v. R. R. Co.*, 50 N. Y. Sup. Ct. 78.

⁵ *James v. R. R. Co.*, L. R. 2 C. P. 635, note; *Prescott v. R. R. Co.*, 113 Mass. 370, note; *Elbert v. R. R. Co.*, 48 Wis. 606.

§ 1187. **Running or Flying Switch — Backing Cars.** — Making a "running" or a "flying" switch — i. e., permitting cars to run over a crossing immediately after the train from which they have been detached — is negligence in the railroad.¹ When the train is backing or cars are being pushed by a locomotive, extra precaution must be used to avoid injuries at crossings;² the ringing the bell or sounding the whistle on the locomotive is not sufficient.³ One about to cross a railroad track on a highway is not negligent in not anticipating that a flying switch is about to be made.⁴

§ 1188. **Contributory Negligence — In General.** — Though the railroad company has been guilty of negligence, the traveler cannot recover damages if he has been guilty of contributory negligence.⁵ Under the rule of comparative negligence prevailing in Illinois and Georgia, slight negligence upon the part of the traveler will not exonerate the company from liability for a willful or reckless disregard of the safety of such traveler.⁶ But though a person comes on the track negligently, yet if the servants of the company after they see his danger can avoid injuring him, they must do so or the company will be liable.⁷ In the absence of evidence to the contrary, a person who

¹ French v. R. R. Co., 116 Mass. 537; Brown v. R. R. Co., 32 N. Y. 597; 88 Am. Dec. 353; Hinckley v. R. R. Co., 120 Mass. 257; Chicago etc. R. R. Co. v. Garvey, 58 Ill. 83; Butler v. R. R. Co., 28 Wis. 487; O'Connor v. R. R. Co., 94 Mo. 150; 4 Am. St. Rep. 364.

² Bailey v. R. R. Co., 107 Mass. 496; Robinson v. R. R. Co., 48 Cal. 409; Romick v. R. R. Co., 62 Iowa, 167.

³ Illinois etc. R. R. Co. v. Ebert, 74 Ill. 399; Chicago etc. R. R. Co. v. Garvey, 58 Ill. 85; McGovern v. R. R. Co., 67 N. Y. 417; Maginnis v. R. R. Co., 52 N. Y. 215; Eaton v. R. R. Co., 51 N. Y. 544; Linfield v. R. R. Co., 10 Cush. 562; 57 Am. Dec. 124.

⁴ O'Connor v. R. R. Co., 94 Mo. 150; 4 Am. St. Rep. 364.

⁵ Toledo etc. R. R. Co. v. Riley, 47 Ill. 514; Eaton v. R. R. Co., 51 N. Y. 544; Steves v. R. R. Co., 18 N. Y. 422; Havens v. R. R. Co., 41 N. Y. 296; Spencer v. R. R. Co., 5 Barb. 337; Harlan v. R. R. Co., 64 Mo. 480; 65 Mo. 22; Hinckley v. R. R. Co., 120 Mass. 257; Rothe v. R. R. Co., 21 Wis. 256; Galena etc. R. R. Co. v. Dill, 22 Ill. 264. When a horse-car crosses the track of a steam-railroad the driver is bound to exercise the highest degree of care and prudence, the utmost skill and foresight: Coddington v. R. R. Co., 102 N. Y. 66.

⁶ Augusta etc. R. R. Co. v. McMurry, 24 Ga. 75; Chicago etc. R. R. Co. v. Triplett, 38 Ill. 482; Macon etc. R. R. Co. v. Davis, 27 Iowa, 113.

⁷ State v. R. R. Co., 52 N. H. 528.

has been killed by a train at a railway crossing will be presumed to have observed the precaution the law requires, and the burden of proof is on the railway company to show that he has not.¹

§ 1189. **Duty to Look and Listen.** — It is the duty of a traveler on approaching a track to look both ways and listen for trains before he crosses it,² and where a person knowing that he is approaching a crossing, and with an unobstructed view of the track in both directions, and nothing to prevent his hearing a coming train, advances to the point of intersection without either looking or listening, his reckless conduct will constitute negligence *per se*, so as to preclude a recovery for the injuries inflicted upon him.³ The rule of law that a railroad track

¹ Pennsylvania R. R. Co. v. Weber, 76 Pa. St. 157; 18 Am. Rep. 407. But see Chase v. R. R. Co., 77 Me. 62; 52 Am. Rep. 744.

² Wichita etc. R. R. Co. v. Davis, 37 Kan. 743; 1 Am. St. Rep. 275; Brown v. R. R. Co., 22 Minn. 165; Ernst v. R. R. Co., 39 N. Y. 61; 100 Am. Dec. 405; Stackus v. R. R. Co., 7 Hun, 559; Chicago etc. R. R. Co. v. Kusel, 63 Ill. 180; Wilcox v. R. R. Co., 39 N. Y. 358; 100 Am. Dec. 440; Chicago etc. R. R. Co. v. McKean, 40 Ill. 218; Chicago etc. R. R. Co. v. Still, 19 Ill. 499; 71 Am. Dec. 236; Chicago etc. R. R. Co. v. Houston, 95 U. S. 697; St. Louis etc. R. R. Co. v. Manly, 58 Ill. 300; Linfield v. R. R. Co., 10 Cush. 562; 57 Am. Dec. 124; Chicago etc. R. R. Co. v. Hatch, 79 Ill. 137; Detroit etc. R. R. Co. v. Van Steinberg, 17 Mich. 99; North Penn. R. R. Co. v. Heileman, 49 Pa. St. 60; 88 Am. Dec. 482; Penn. R. R. Co. v. Weber, 76 Pa. St. 157; 18 Am. Rep. 407; Penn. R. R. Co. v. Beale, 73 Pa. St. 504; 13 Am. Rep. 753; Schofield v. R. R. Co., 114 U. S. 615; Wabash etc. R. R. Co. v. Central Trust Co., 23 Fed. Rep. 622; Lesan v. R. R. Co., 77 Me. 85; State v. R. R. Co., 77 Me. 538; Thompson v. R. R. Co., 33 Hun, 16; Hixson v. R. R. Co., 80 Mo. 335; Union Pacific R. R. Co. v. Adams, 33

Kan. 427; Pence v. R. R. Co., 63 Iowa, 746; Clark v. R. R. Co., 35 Kan. 350; Chicago etc. R. R. Co. v. Hedges, 105 Ind. 393; Rhoades v. R. R. Co., 58 Mich. 263; Taylor v. R. R. Co., 86 Mo. 457; Shaber v. R. R. Co., 28 Minn. 103.

³ Gonzales v. R. R. Co., 38 N. Y. 440; 98 Am. Dec. 58; Chicago etc. R. R. Co. v. Damrell, 81 Ill. 450; Rockford etc. R. R. Co. v. Byam, 80 Ill. 528; Bellefontaine etc. R. R. Co. v. Hunter, 33 Ind. 335; 5 Am. Rep. 201; Allyn v. R. R. Co., 105 Mass. 77; Benton v. R. R. Co., 42 Iowa, 192; New Orleans etc. R. R. Co. v. Mitchell, 52 Miss. 808; Gorton v. R. R. Co., 45 N. Y. 600; Reynolds v. R. R. Co., 58 N. Y. 248; Cleveland etc. R. R. Co. v. Elliott, 28 Ohio St. 340; Lake Shore etc. R. R. Co. v. Sunderland, 2 Bradw. 307; Fletcher v. R. R. Co., 64 Mo. 484; Leduke v. R. R. Co., 4 Mo. App. 485; Lake Shore etc. R. R. Co. v. Miller, 25 Mich. 274; Brooks v. R. R. Co., 1 Abb. App. 211; Toledo etc. R. R. Co. v. Shuckman, 50 Ind. 42; Brendell v. R. R. Co., 27 Barb. 534; Payne v. R. R. Co., 39 Iowa, 523; 44 Iowa, 236; Cleveland etc. R. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. Rep. 633; Ernst v. R. R. Co., 39 N. Y. 61; 100 Am. Dec. 405; Wilcox v. R. R. Co., 39 N. Y. 358; 100 Am. Dec. 440; Schofield v.

is in itself a warning of danger applies as well to a side-track as to a main line.¹ But the fact that one in attempting to cross a railroad does not at the instant of stepping on it look to ascertain if a train is approaching is not conclusive evidence of a want of due care on his part; but his omission to do so is for the jury.²

Some cases hold that he should come to a halt;³ and where the peculiarities of the situation require such pre-

R. R. Co., 2 McCrary, 268; Wabash etc. R. R. Co. v. Hicks, 13 Ill. App. 407; Schaefer v. R. R. Co., 62 Iowa, 624; International etc. R. R. Co. v. Graves, 59 Tex. 330; Chicago etc. R. R. Co. v. Houston, 95 U. S. 697; South etc. R. R. Co. v. Thompson, 62 Ala. 494; Powell v. R. R. Co., 76 Mo. 80; Allyn v. R. R. Co., 105 Mass. 77; Indiana etc. R. R. Co. v. Hammock, 118 Ind. 1; Glascock v. R. R. Co., 73 Cal. 137; Atchison etc. R. R. Co. v. Townsend, 39 Kan. 115; Damrill v. R. R. Co., 27 Mo. App. 202. In North Penn. R. R. Co. v. Heileman, 49 Pa. St. 60, 88 Am. Dec. 482, the court say: "The evidence justified the defendants in proposing their points to the court, the first of which was as follows: 'That it is the duty of a traveler approaching a railroad crossing to look along the line of the railroad and see if any train is coming; and if the jury believe the plaintiff failed to take such a precaution, he was guilty of negligence, and cannot recover in this suit.' This point the court answered by saying: 'This is one of the reasonable precautions a man is bound to use, and its absence is evidence of neglect.' This was not a full answer to the point. The court conceded that looking out for the approach of a train is a duty, when a traveler is about to cross a railroad track; but instead of charging the jury that failure to look out is negligence, instructed them that it was evidence of negligence. This was not all the defendants asked, nor all they were entitled to have. Absence of such a precaution was more than evidence of negligence. It was negligence itself, and it was such as may have contributed directly to the injury;

for the uncontradicted evidence was, that the plaintiff drove his horse and wagon slowly upon the track in front of the passing locomotive. If he did this without looking along the track, he acted without any precaution against a known danger, and he was not entitled to recover if his want of precaution contributed to his hurt. That what constitutes negligence in a particular case is generally a question for the jury, and not for the court, is undoubtedly true, because negligence is want of ordinary care. To determine whether there has been any involves, therefore, two inquiries: 1. What would have been ordinary care under the circumstances; and, 2. Whether the conduct of the person charged with negligence came up to that standard. In most cases, the standard is variable, and it must be found by a jury. But when the standard is fixed, where the measure of duty is defined by the law, entire omission to perform it is negligence. In such a case, the jury have but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure, and pronounces it negligence."

¹ Mynning v. R. R. Co., 59 Mich. 257.

² Plummer v. R. R. Co., 73 Me. 591.

³ Wilds v. R. R. Co., 29 N. Y. 315, 328; Pennsylvania Canal Co. v. Beattley, 66 Pa. St. 30; Kelly v. R. R. Co., 88 Mo. 534; Seefeld v. R. R. Co., 70 Wis. 216; 5 Am. St. Rep. 168; *contra*, Leavenworth etc. R. R. Co. v. Rice, 10 Kan. 426, 438; Bunting v. R. R. Co., 14 Nev. 351.

cautions, get out of his wagon and approach, and look along the track in both directions.¹ But where these precautions would be unavailable, as where the time necessarily consumed in going from the wagon to the crossing, returning to the wagon, and then driving to the track, would have enabled the train, at the rate of speed it was running, to have reached the crossing in about the same time, from a point at which it was not visible from the traveler's point of observation, he is under no obligation to do so;² nor where the want of care of the managers of the train would have rendered such a precaution of no avail.³ The degree of diligence required of the traveler is such as a man of ordinary prudence would exercise under similar circumstances.⁴ One who fails to hear a train because rattling bottles in his wagon, which he does not stop before crossing the track, prevent his hearing, has only himself to blame if he is struck by the train.⁵ So one who walks in front of moving cars with an umbrella over his head is guilty of negligence.⁶ It does not excuse the traveler from looking that he supposed the train had passed at the usual hour, it being in fact behind time;⁷ or that the railroad omitted to give warning signals, or that the railroad has just made a flying switch;⁸ or that he had to obstruct his sight to prevent his hat from being blown away, and that he relied upon his hearing;⁹ or that he had forgotten that he was in the vicinity

¹ *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504; 13 Am. Rep. 753.

² *Duffy v. R. R. Co.*, 32 Wis. 269.

³ *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St. 265; *McGuire v. R. R. Co.*, 2 Daly, 761.

⁴ *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Kennedy v. R. R. Co.*, 36 Mo. 351; *Bernhard v. R. R. Co.*, 1 Abb. App. 131; 32 Barb. 165; 19 How. Pr. 199; 18 How. Pr. 427; *McGrath v. Hudson etc. R. R. Co.*, 32 Barb. 144; 19 How. Pr. 211; *Central R. R. Co. v. Moore*, 24 N. J. L.

824; *Continental Improvment Co. v. Stead*, 95 U. S. 161; *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 639; 15 Am. Rep. 633.

⁵ *Merkle v. R. R. Co.*, 49 N. J. L. 473.

⁶ *Yancey v. R. R. Co.*, 93 Mo. 433.

⁷ *Toledo etc. R. R. Co. v. Jones*, 76 Ill. 311.

⁸ *Ormsbee v. R. R. Co.*, 14 R. I. 102; 51 Am. Rep. 354; *Ernst v. R. R. Co.*, 35 N. Y. 7; 90 Am. Dec. 761.

⁹ *Butterfield v. R. R. Co.*, 10 Allen, 532; 87 Am. Dec. 679.

of the crossing.¹ But it is an excuse that his looking or listening would have been unavailing,² as where the train came from a direction where it could not have been seen in time;³ or where other noises drowned the rumbling of the approaching train;⁴ or where he could not see if he had stopped to look, and could not have heard because the train made so little noise.⁵ But one on a public highway who approaches a railroad track, and can neither see nor hear any indications of a moving train, is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given.⁶ While the rule of law requires a traveler on the highway on approaching its intersection with a railroad to stop, look, and listen for approaching trains, yet in the absence of evidence the presumption is that the traveler did his duty in that respect.⁷

ILLUSTRATIONS. — A, approaching a railroad crossing in his wagon, in the daytime, in a city, fails to look both ways for approaching trains, and is run over by a train which is approaching at a rate of speed greater than that allowed by the ordinances of the city. *Held*, contributory negligence in A: *St. Louis etc. R. R. Co. v. Mathias*, 50 Ind. 65. A drives his team along a road running parallel with and near to a railroad track. As he approaches the crossing, the air is so filled with dust that he cannot see the railroad, and his wagon makes some noise. Nevertheless he attempts to cross without stopping to listen for an approaching train, and his horses are killed. *Held*, that he

¹ *Baltimore etc. R. R. Co. v. Whitacre*, 35 Ohio St. 627.

² *Davis v. R. R. Co.*, 47 N. Y. 400; *Hackford v. R. R. Co.*, 6 Lans. 381; *Leonard v. R. R. Co.*, 10 Jones & S. 225.

³ *McGuire v. R. R. Co.*, 2 Daly, 76; *Chicago etc. R. R. Co. v. Lee*, 87 Ill. 454.

⁴ *Davis v. R. R. Co.*, 47 N. Y. 400; *Leonard v. R. R. Co.*, 10 Jones & S. 225.

⁵ *Donohue v. R. R. Co.*, 91 Mo. 357.

⁶ *Tabor v. R. R. Co.*, 46 Mo. 353; 2 Am. Rep. 517; *Ernst v. R. R. Co.*, 35 N. Y. 9; 90 Am. Dec. 761; *Beisiegel v. R. R. Co.*, 34 N. Y. 622; 90 Am. Dec. 741; *Cosgrove v. R. R. Co.*, 87 N. Y. 88; 41 Am. Rep. 355.

⁷ *Schum v. R. R. Co.*, 107 Pa. St. 8; 52 Am. Rep. 468; *Wilcox v. R. R. Co.*, 39 N. Y. 358; 100 Am. Dec. 440.

cannot recover damages: *Flemming v. R. R. Co.*, 49 Cal. 253. One driving a loaded team, in passing over a railroad crossing, neglected to look towards the west, whence a train was approaching, whereof there was an unobstructed view at points two hundred and fifty feet distant and fifty feet distant on the road he had come on, whipped up his horses instead of backing down, and they passed safely over, but the wagon was struck. *Held*, that his administratrix could not recover: *Connelly v. R. R. Co.*, 88 N. Y. 346. The plaintiff was injured at a railroad crossing. He was riding in an open carriage, by daylight, and did not see the sign at the crossing, though plainly visible. He had a careful driver and a steady horse. *Held*, not sufficient evidence of due care on his part, without proof that the driver looked out for approaching trains: *Allyn v. R. R. Co.*, 105 Mass. 77. Deceased was approaching the crossing in a wagon. The crossing was at an acute angle, and the view was so obstructed by trees and corn that a train could not be seen beyond ten yards from the track, and then for only fifty yards. The train was moving forty miles an hour without giving warning. It did not appear that deceased stopped and looked and listened. *Held*, that a nonsuit for contributory negligence was improper: *Schum v. R. R. Co.*, 107 Pa. St. 8; 52 Am. Rep. 468. Plaintiff driving over a railway at a highway crossing, his horse caught his foot between the rail and planking, and fell down. For two minutes the plaintiff was busied in trying to disengage the foot, when a train passing broke the horse's leg. *Held*, that the rule that the plaintiff should have stopped, looked, and listened before driving onto the track was not applicable: *Baughman v. R. R. Co.*, 92 Pa. St. 335; 37 Am. Rep. 690. A person about to cross a railroad crossing with a single track and infrequent trains when he was about one hundred yards from the crossing saw a train with the rear towards him, going, apparently, in an opposite direction. He did not keep his eyes fixed upon the train, but his attention was distracted by the motions of persons at some distance, who were waving him, but whose motions he did not understand. *Held*, that there was no legal obligation on him to keep his eyes fixed on the train, but the question of due care on his part was for the jury: *Bonnell v. R. R. Co.*, 39 N. J. L. 189. The deceased was struck and killed while attempting to cross defendant's railroad in a frequented path leading across the tracks; the day was clear, and the engine might have been seen for at least fifty yards from the point where the casualty occurred. The bell on the engine was not rung, but the bell of another engine standing in the yard near by was being rung at the time, which might have misled the deceased if he had trusted to hearing

alone; he could not have been seen after he had passed upon the tracks in order to stop the train. *Held*, that although the defendant's employees were guilty of negligence in not sounding the bell on the engine which caused the injury, yet a verdict for the plaintiff was erroneous, as he was guilty of contributory negligence: *Harlan v. R. R. Co.*, 65 Mo. 22. Plaintiff was crossing a railway by a level crossing. A hedge and buildings obstructed the view so that he could not see along the line to the left until he got onto the railroad, but he could not then have seen, and he did not look. He was injured by a train approaching from the left on the farther line. The engine-driver did not whistle, and the gate-keeper at the level crossing gave no warning. *Held*, that the injury was caused solely by plaintiff's own negligence: *Davey v. R. R. Co.*, Eng. Ct. App., 49 L. T., N. S., 739. A was killed at a railroad crossing. The highway crossed the track at an acute angle. A was driving a gentle horse, and the condition of the road was such as to prevent fast driving. The night was dark and misty, but A's witnesses testified that the head-light of the engine could have been seen at a distance much more than sufficient to give warning, and to enable him to escape injury. *Held*, that A should have been unsuited: *Tolman v. R. R. Co.*, 98 N. Y. 198; 50 Am. Rep. 649.

§ 1190. **Other Acts of Contributory Negligence at Crossings.**—Where the plaintiff voluntarily places himself in a dangerous position at the crossing, this is contributory negligence on his part.¹ The following have been held to be contributory negligence: Passing under a car while it is standing still or in motion;² climbing over cars at rest, without looking to see if they are attached to an engine;³ after having nearly crossed a track, attempting to go back when the approaching train was only four hundred feet away;⁴ driving or passing through a space

¹ *Grows v. R. R. Co.*, 67 Me. 100; *Brooks v. R. R. Co.*, 1 Abb. App. 211; *McMahon v. R. R. Co.*, 39 Md. 438; *Lewis v. R. R. Co.*, 38 Md. 588; 17 Am. Rep. 521; *Central R. R. Co. v. Moore*, 24 N. J. L. 824; *Wilds v. R. R. Co.*, 29 N. Y. 315; *Indiana etc. R. R. Co. v. McClaren*, 62 Ind. 566; *Indiana etc. R. R. Co. v. Staples*, 62 Ill. 313; *Faber v. R. R. Co.*, 29 Minn. 465; *Shaber v. R. R. Co.*, 28 Minn. 103; *Pittsburgh etc. R. R. Co. v.*

Dunn, 56 Pa. St. 280; *Peck v. R. R. Co.*, 50 Conn. 379; *Whitney v. R. R. Co.*, 69 Me. 208; *Chicago etc. R. R. Co. v. Miller*, 46 Mich. 532.

² *McMahon v. R. R. Co.*, 39 Md. 438; *Central R. R. Co. v. Dixon*, 42 Ga. 327.

³ *Lewis v. R. R. Co.*, 38 Md. 588; 17 Am. Rep. 521; *O'Mara v. R. R. Co.*, 18 Hun, 192.

⁴ *McPhillips v. R. R. Co.*, 12 Daly, 365.

left between two cars;¹ leaving a span of horses unhitched in close proximity to a railroad, at a time when

¹ *Lake Shore etc. R. R. Co. v. Clemens*, 5 Ill. App. 77; *Lake Shore etc. R. R. Co. v. Pinchin*, 112 Ind. 592, the court saying: "There are cases where the court must, as a matter of law, declare that an act constitutes negligence. Where the facts are undisputed, and lead to but one inference, the question whether there was or was not negligence is a question of law: *R. R. Co. v. Spencer*, 98 Ind. 186. This is such a case. It must be affirmed as matter of law, on the facts exhibited in the answers of the jury, that the appellee was guilty of negligence in attempting to pass between the cars, and in the manner in which he took to carry out the attempt. He knew the train was not to remain in the town, but was there on its trip westward, and he knew that it had broken in two; so that, even if he was not negligent in making the attempt to cross he was negligent in the manner in which he conducted himself in making his way between the cars. If it were conceded that he was without fault in endeavoring to pass through the train, still it must be held that he was negligent in not exercising a higher degree of care in effecting what no reasonable man could avoid knowing was a dangerous passage between the cars. He was burdened with things that interfered with his safely clambering through the train; he made no haste, but laid the things he had in his hands on the end of one of the cars, and before leaving his dangerous position picked them up, and put one of them in his pocket. This was not such care as was required, even had he been crossing with permission of the railroad company, and without fault. It by no means follows that because a man may do an act, that he may do it carelessly. But we need not place our decision upon the ground that the manner in which the appellee attempted to cross between the cars made him guilty of contributory negligence, for he was guilty of negligence in making the attempt. There was, therefore, negligence in entering upon the act, as well as in the manner of performing it. A person who has

knowledge that a train of cars is stopping temporarily at a way-station on its way to its destination has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it: *Rauch v. Lloyd*, 31 Pa. St. 358; *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. R. R. Co.*, 67 Mo. 671; *Lewis v. R. R. Co.*, 38 Md. 588; *Haldan v. R. R. Co.*, 30 U. C. C. P. 89. It will not avail the plaintiff that he was not fully aware of his danger; for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man: *Pennsylvania R. R. Co. v. Henderson*, 43 Pa. St. 449; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374. A man must use his senses, and is not excused where he fails to discover the danger, if he has made no attempt to employ the faculties nature has given him: 2 Wood on Railway Law, 1319, note 2; *Toledo etc. R. R. Co. v. Goddard*, 25 Ind. 200. One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence. But here the case is stronger, because the fact is that the appellee might have known, by observation or 'by feeling,' that the train was actually in motion when he attempted to 'get down.' The fact that a plaintiff has knowledge of a danger that he will encounter if he pursues his way does not always necessarily preclude a recovery, but it is in every case an important factor: *Toledo etc. R. R. Co. v. Brannagan*, 75 Ind. 490, and cases cited; *City of Huntington v. Breen*, 77 Ind. 29; *Murphy v. City*, 83 Ind. 76; *Wilson v. Trafalgar etc. Co.*, 83 Ind. 326; *Henry etc. Co. v. Jackson*, 86 Ind. 111; *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *Town of Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230; *Board v. Dombke*, 94 Ind. 72; *City of South Bend v. Hardy*, 98 Ind. 577; 49 Am. Rep. 792; *City of Indianapolis v. Cook*, 99 Ind. 10; *City of Aurora v. Bitner*, 100 Ind. 396; *Beach on Contributory Negligence*, 40, 258.

the train usually comes along, where the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them, and is injured;¹ approaching and stepping upon the track during a high wind, with his hat over his face and without looking up the track;² driving or running towards the crossing at such a high rate of speed as to be unable to stop in time to avoid danger;³ endeavoring to drive or rush across ahead of the train;⁴ even though it is going faster than the law allows and than the person anticipated,⁵ or starts without the usual signal.⁶

But the high rate of speed is not necessarily negligence, where, though great, it is not unreasonably or recklessly so, and would not necessarily lead to a collision;⁷ or where the rapid driving is resorted to as the only practicable

But the fact that the danger is known, or might be known by the exercise of the natural faculties, will preclude a recovery where it is immediate, and of such a character as to impose upon one who undertakes to pass the danger a hazard that a prudent man would not incur. A man has no right to cast himself upon a known danger where the act subjects him to great peril. If there is a risk, apparent or known, that will probably result in injury, he must not encounter it: *Toledo etc. R. R. Co. v. Brannagan*, 75 Ind. 490. It is to be determined from the facts of the case whether the known danger is likely to subject the plaintiff to injury; and if it is, then he must be held guilty of negligence in encountering it. While, therefore, it cannot be held that one who does not go out of his way to avoid a known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger, where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will

preclude a recovery: *Town of Gosport v. Evans*, 112 Ind. 133. In this case the risk of passing between a train of cars likely to get under way at any moment was such as no one could assume without being guilty of negligence. This is one of the cases where it must be declared, as matter of law, that the risk is so great that no one who has a knowledge of the danger has a right to assume it."

¹ *Denville v. R. R. Co.*, 50 Cal. 383.

² *Nicholson v. R. R. Co.*, 41 N. Y. 525.

³ *Grippen v. R. R. Co.*, 40 N. Y. 34; *Salter v. R. R. Co.*, 13 Hun, 187; *Harling v. R. R. Co.*, 13 Barb. 9; *Wilds v. R. R. Co.*, 24 N. Y. 430; *Ohio etc. R. R. Co. v. Eves*, 42 Ill. 288.

⁴ *Grows v. R. R. Co.*, 67 Me. 100; *Rigler v. R. R. Co.*, 94 N. C. 604; *State v. R. R. Co.*, 76 Me. 357; 49 Am. Rep. 622; *Baltimore etc. R. R. Co. v. Mali*, 66 Md. 53; *Schwartz v. R. R. Co.*, 4 Robt. 347; *Pennsylvania R. R. Co. v. Morel*, 40 Ohio St. 338; *Chicago etc. R. R. Co. v. Becker*, 76 Ill. 25.

⁵ *Kelley v. R. R. Co.*, 75 Mo. 138.
⁶ *Baltimore etc. R. R. Co. v. Depew*, 40 Ohio St. 121.

⁷ *Hackford v. R. R. Co.*, 53 N. Y. 654; 43 How. Pr. 222.

means of extricating himself from the difficulties of the situation, by one who has without negligence driven so near the track as to render retreat apparently impossible.¹ It may or may not be negligence for one about to cross a track not to wait until a train which has just passed has got far enough away to afford an unobstructed view of the track in that direction.² And it has been held that one who drives a known vicious or skittish horse on a public road running by the side of a railroad does so at his peril.³

ILLUSTRATIONS. — A traveler is killed in consequence of attempting in the night-time to open the gates of a railway company at a place where the highway crosses their railway, there being no servant of the company in attendance to open the gates. No damages can be recovered of the railway company, since, under the statutes regulating the subject, he had no right to attempt to open the gates: *Wyatt v. R. R. Co.*, 6 Best & S. 709. A was killed by a train at a crossing, the view of which was obscured by smoke. Had he waited a moment he could have seen the train. *Held*, that a verdict for the defendant was properly ordered: *McCrorry v. R. R. Co.*, 31 Fed. Rep. 531. A man familiar with a railroad crossing at the time of running of trains heard the rumbling of a regular passenger train, which carried no head-light as usual, only a lantern, which he did not see. He supposed that the train which he heard was going the

¹ *Macon etc. R. R. Co. v. Davis*, 27 Ga. 113.

² *Phila. etc. R. R. Co. v. Carr*, 99 Pa. St. 505; *Ingersoll v. R. R. Co.*, 4 Hun, 277.

³ *Phila. etc. R. R. Co. v. Stinger*, 78 Pa. St. 219, the court saying: "It is true, the law will not banish horses from the highways. It is equally clear that the plaintiff had a right to drive the horse referred to, or any other horse, however vicious, upon the Gray's Ferry road, at this particular point of danger. We are not dealing with the absolute rights of the parties. The question here is one of prudence and care. When a man drives an unbroken or vicious horse, or one that is easily frightened by a locomotive, along a public road running side by side with a railroad, and liable to be met or overtaken by a train, he does so at his own risk. It is an act

amounting to recklessness. That there was no other road for the plaintiff to use does not matter. There were other horses which he might have procured for use in such a dangerous locality. Duties and obligations are mutual. The railroad company had as high a right to move their trains upon their road as the plaintiff had to drive his horse along Gray's Ferry road. Both were bound to the exercise of care in accordance with the circumstances of the case. We do not lose sight of the fact that in such questions as this the interests of other parties are concerned. The right of a man to risk his own life, and that of his horse, may be conceded; but not the right by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be traveling in a train of cars."

other way, and he stepped upon the track and was struck and injured. Others near by saw the lantern. *Held*, contributory negligence: *Mahlen v. R. R. Co.*, 49 Mich. 585. Plaintiff, while caring for cattle in a car, crossed three or four tracks, and while standing on the fifth turned to look around in response to shouting, and was struck by an engine. The five tracks were on a level, fully exposed; and an engine could be seen for several hundred feet in either direction. *Held*, contributory negligence: *Rogstad v. R. R. Co.*, 31 Minn. 208. There were two roads of about equal length leading to plaintiff's destination, and he took the one near the railroad, knowing that he was likely to meet a train, but not knowing that the road was not properly fenced on the side, and his horse, taking fright at the train, threw him over the banking where the fence was gone. *Held*, not *per se* negligence: *Templeton v. Montpelier*, 56 Vt. 328. The wife of a railroad employee carrying her husband his dinner started to cross six busy tracks, and stepping from behind some cars on one she was struck by an engine backing down on another. *Held*, contributory negligence: *Pzolla v. R. R. Co.*, 54 Mich. 273. Plaintiff, a girl sixteen years old, was passing along the street across defendant's tracks (five in number). She looked both ways for trains, and when about midway of the crossing, stopped for a train to pass which was coming from the east. The position in which she stood was sufficiently near another track for her to be struck by the tender of an engine, which, unseen by her, backed up from the west, without any signals of warning. *Held*, that a nonsuit was error: *Haycroft v. R. R. Co.*, 64 N. Y. 636. Plaintiff was standing at a railway crossing, in a street where there were many trains passing and much switching done; while waiting for one train to pass, he was struck behind by another train, which was running at the rate of ten miles an hour, in violation of a city ordinance. *Held*, that whatever negligence might be charged to the plaintiff was slight, and that of the company was gross: *Pittsburgh etc. R. R. Co. v. Knutson*, 69 Ill. 103. A postmaster at a station, hearing a train approach at about 8:40, p. m., the time the mail train usually passed, started with his mail-bags to cross the track to the platform. The train was then twelve hundred feet distant, but running at great speed. Relying on its stopping, he was struck by the locomotive and killed. The train was a freight train, which had been ordered to go without stopping, the mail train being behind time. *Held*, contributory negligence: *Moody v. R. R. Co.*, 68 Mo. 470.

§ 1191. Persons under Physical Disabilities — Children. — Physical disabilities of the traveler do not excuse

him from using care, but rather increase his duty to be vigilant; as, for instance, deafness,¹ or drunkenness.² It is contributory negligence for one of defective eyesight and hearing to walk upon a railroad track at a time when a train is known to be due.³ But a railroad sued for an injury to a passenger, who, while about to alight from a train, was thrown down by a collision with a switch-engine violently run against the train, cannot defend on the ground that if the passenger had not been in feeble health he would not have been thrown down.⁴

Where a traveler was so wrapped up to protect himself from the cold that he could not hear distinctly, it was held that he was under an obligation to exercise special vigilance.⁵ So a person approaching a crossing in a covered wagon, having an umbrella hoisted inside as an additional protection from rain which was falling at the time, is not in the exercise of reasonable care when looking only straight ahead.⁶ But the failure of a traveler in a covered buggy to let down his buggy-top before starting up after stopping his horse at the sign-board of a railroad crossing, and looking each way for trains, was held not to be negligence *per se*.⁷ A child of tender years, or an old or infirm person, is expected to exercise no more than that degree of care due from those of his age or condition.⁸

¹ Cleveland etc. R. R. Co. v. Terry, 8 Ohio St. 570; Central R. R. Co. v. Feller, 84 Pa. St. 226; Purl v. R. R. Co., 72 Mo. 168; Zimmerman v. R. R. Co., 71 Mo. 476; Waldele v. R. R. Co., 19 Hun, 93. It is negligence for a deaf person to drive an unmanageable horse across a railroad track when a train is approaching: Illinois etc. R. R. Co. v. Buchner, 28 Ill. 299; 81 Am. Dec. 282. Where persons running a train, knowing that a man on the track is deaf, run him down, the company is liable: Int. & G. R. R. Co. v. Smith, 62 Tex. 252.

² Chicago etc. R. R. Co. v. Bell, 70 Ill. 102; Toledo etc. R. R. Co. v. Riley, 47 Ill. 514.

³ Maloy v. R. R. Co., 84 Mo. 270.

⁴ East Line etc. R. R. Co. v. Rushing, 69 Tex. 306.

⁵ Illinois etc. R. R. Co. v. Ebert, 74 Ill. 399; Butterfield v. R. R. Co., 10 Allen, 532; Steves v. R. R. Co., 18 N. Y. 422; Chicago etc. R. R. Co. v. Still, 19 Ill. 508; 71 Am. Dec. 236; Hanover etc. R. R. Co. v. Coyle, 54 Pa. St. 396; Salter v. R. R. Co., 75 N. Y. 273.

⁶ Sheffield v. R. R. Co., 21 Barb. 339.

⁷ Stackus v. R. R. Co., 79 N. Y. 464.

⁸ Elkins v. R. R. Co., 115 Mass. 190; Chicago etc. R. R. Co. v. Becker, 84 Ill. 483; Costello v. R. R. Co., 65 Barb. 92; Phila. etc. R. R. Co. v. Spearen, 47 Pa. St. 300; 86 Am. Dec.

ILLUSTRATIONS. — The plaintiff, or the driver of the wagon in which he was seated, knew not that they had arrived at the crossing, although the latter had previous knowledge that the road crossed at that point, but there was no sign to give them notice, and the train was running at the rate of thirty miles an hour, giving no signals of its approach. *Held*, that the facts that the driver, a boy ten years of age, had the lappets of his cap tied over his ears, and did not look or listen for the train, nor tell his companion what he knew of the crossing, though competent to go to the jury as evidence of negligence on the part of the plaintiff, were not conclusive: *Elkins v. R. R. Co.*, 115 Mass. 190. A driver muffled up approached slowly in a covered wagon a railroad crossing with which he was familiar, without looking out or stopping at a place where one could not see up and down the track till within sixteen feet of it. *Held*, guilty of negligence: *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396. A came up from a cellar with two bags of shorts on his right shoulder, so that his view on that side was completely obstructed, and probably so as to prevent his hearing in his right ear, and knowing the precise location of the track, and that trains of cars were constantly passing, walked onto the track, where he was run over by the cars. Persons standing around saw the cars approaching. The space from the cellar to the track was open, and used by the public to pass and repass, but was not a public crossing. *Held*, that he was guilty of such negligence that the company were not liable: *Rothe v. R. R. Co.*, 21 Wis. 256.

§ 1192. **Trespassers on Tracks. — Duty and Liability of Company.** — It is held in some cases that a railroad company is under no duty towards trespassers on its track, and that except at railroad crossings, where, as we have seen, the public has a right of way, a person walking or being upon a railroad track does so at his peril,¹ and

544; *Boland v. R. R. Co.*, 36 Mo. 484; *Isabel v. R. R. Co.*, 60 Mo. 475; *Chicago etc. R. R. Co. v. Murray*, 71 Ill. 601; *McGovern v. R. R. Co.*, 67 N. Y. 417; *Paducah etc. R. R. Co. v. Hoehl*, 12 Bush, 41; *Thurber v. R. R. Co.*, 60 N. Y. 326; *Warner v. R. R. Co.*, 6 Phila. 537; *Haas v. R. R. Co.*, 41 Wis. 44; *O'Mara v. R. R. Co.*, 38 N. Y. 445; 98 Am. Dec. 61, the court saying: "The old, the lame, and infirm are entitled to the use of the street, and more care must be exercised towards them by engineers than towards those

who have better powers of motion. The young are entitled to the same rights, and cannot be expected to exercise as good foresight and vigilance as those of maturer years."

¹ *Mulherrin v. R. R. Co.*, 81 Pa. St. 366; *Little Schuylkill etc. R. R. Co. v. Norton*, 24 Pa. St. 465; 64 Am. Dec. 672; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 275; 84 Am. Dec. 457; *Nolan v. R. R. Co.*, 53 Conn. 461. However fast a wild train may run, the company is not chargeable with negligence as to one who is crossing

that the company is not liable, except where the injury is wanton or intentional.¹

On the other hand, it is held by other courts that even as to trespassers the railroad is bound to use ordinary care to prevent injury to them.² This rule is stated in a Missouri case in these words: "When it is said, in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the party stood, the accident could have been prevented; or if the company failed to discover the danger, through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity."³ The servants of the company are not obliged to stop the train on seeing a person on the track; they have a right

the track at a point not at a public crossing. Nor does it matter that no signal was given: *Shackleford v. R. R. Co.*, 84 Ky. 43.

¹ *Little Schuykill R. R. Co. v. Norton*, 24 Pa. St. 465; 64 Am. Dec. 672; *Heil v. Glanding*, 42 Pa. St. 493; 82 Am. Dec. 537; *Jeffersonville etc. R. R. Co. v. Goldsmith*, 47 Ind. 43; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Pittsburgh etc. R. R. Co. v. Collins*, 87 Pa. St. 405; 30 Am. Rep. 371; *Cincinnati etc. R. R. Co. v. Eaton*, 53 Ind. 310; *Evansville etc. R. R. Co. v. Wolf*, 59 Ind. 89; *Carroll v. R. R. Co.*, 13 Minn. 30; *Herring v. R. R. Co.*, 10 Ired. 402; 51 Am. Dec. 395; *Donaldson v. R. R. Co.*, 21 Minn. 293; *Morrissey v. R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Terre Haute etc. R. R. Co. v. Graham*, 95 Ind. 286; 48 Am. Dec. 719; *Mason v. R. R. Co.*, 27 Kan. 83; 41 Am. Rep. 405; *Frazer v. R. R. Co.*, 81 Ala. 185; 60 Am. Dec. 145; *Houston etc. R. R. Co. v. Richards*, 59 Tex. 373; *Terre Haute etc. R. R. Co. v. Graham*, 46

Ind. 237; *Louisville etc. R. R. Co. v. Howard*, 82 Ky. 212; *Western etc. R. R. Co. v. Bloomingdale*, 74 Ga. 604. One who without authority enters upon a railway track, and while there becomes insensible from providential causes, and while in this state, and in plain view, is injured by a train, may recover damages of the company, although the injuries were not wanton or willful; but otherwise if his insensibility was by reason of his voluntary intoxication: *Houston etc. R. R. Co. v. Sympkins*, 54 Tex. 615; 38 Am. Rep. 632.

² *Harlan v. R. R. Co.*, 65 Mo. 22; *Brown v. R. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Isabel v. R. R. Co.*, 60 Mo. 475; *Finlayson v. R. R. Co.*, 1 Dill. 579; *Baltimore etc. R. R. Co. v. State*, 36 Md. 366; *Baltimore etc. R. R. Co. v. State*, 33 Md. 542; *Vicksburg etc. R. R. Co. v. McGowan*, 62 Miss. 682; 52 Am. Rep. 205; *Mo. Pac. R. R. Co. v. Weisen*, 65 Tex. 443.

³ *Harlan v. R. R. Co.*, 65 Mo. 22.

to assume that he will obey the warning signals,¹ except it seems, where the trespasser is a young child,² or a person who it is clear does not hear or understand the signals.³

In general, a trespasser on a railroad track who fails to get out of the way of an approaching train, and is injured, is guilty of contributory negligence, and will be without remedy against the company, even though it also has been guilty of negligence.⁴ One who in traveling on a railroad track is overtaken upon a trestle by a train can maintain no action for his injuries.⁵ A railroad is not liable for the death of one who, while walking on its track without right, intermeddled with a torpedo which had been placed there as a danger-signal, and was killed by its explosion.⁶ It is contributory negligence barring a recovery to go to sleep on the track,⁷ or walk or sit down there while drunk,⁸ or to crawl under cars which have temporarily stopped;⁹

¹ *Herring v. R. R. Co.*, 10 Ired. 402; 51 Am. Dec. 395; *Poole v. R. R. Co.*, 8 Jones, 340; *Harty v. R. R. Co.*, 42 N. Y. 468; *Terre Haute etc. R. R. Co. v. Graham*, 46 Ind. 239; *Frech v. R. R. Co.*, 39 Md. 574; *Manly v. R. R. Co.*, 74 N. C. 655; *Holmes v. R. R. Co.*, 37 Ga. 593; *Maher v. R. R. Co.*, 64 Mo. 267; *Kenyon v. R. R. Co.*, 5 Hun, 479; *Maloy v. R. R. Co.*, 84 Mo. 270; *Ohio etc. R. R. Co. v. Walker*, 113 Ind. 196; *St. Louis etc. R. R. Co. v. Monday*, 49 Ark. 257.

² *Pa. R. R. Co. v. Morgan*, 82 Pa. St. 134; *Phila. etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; *Meyer v. R. R. Co.*, 2 Neb. 319; *McMillan v. R. R. Co.*, 46 Iowa, 231; *Kenyon v. R. R. Co.*, 5 Hun, 479; *East Tenn. etc. R. R. Co. v. St. John*, 5 Sneed, 524; 73 Am. Dec. 149; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318.

³ *Frech v. R. R. Co.*, 39 Md. 574; *Cook v. R. R. Co.*, 67 Ala. 533.

⁴ *Gonzales v. R. R. Co.*, 50 How. Pr. 126; *Green v. R. R. Co.*, 11 Hun, 333; *Poole v. R. R. Co.*, 8 Jones, 340; *Illinois etc. R. R. Co. v. Hall*, 72 Ill. 222; *Illinois etc. R. R. Co. v. Hetherington*, 83 Ill. 510; *Harlan v. R. R. Co.*, 64 Mo. 480; *Carlin v. R. R. Co.*, 37 Iowa, 316; *Murphy v. R. R. Co.*,

45 Iowa, 661; 38 Iowa, 539; *Laicher v. R. R. Co.*, 28 La. Ann. 320; *Bancroft v. R. R. Co.*, 11 Allen, 34; 97 Mass. 275; *Michigan etc. R. R. Co. v. Campau*, 34 Mich. 468; *Carroll v. R. R. Co.*, 13 Minn. 30; 97 Am. Dec. 221; *Donaldson v. R. R. Co.*, 21 Minn. 293; *Lake Shore etc. R. R. Co. v. Hart*, 87 Ill. 529; *Rothe v. R. R. Co.*, 21 Wis. 256; *Elwood v. R. R. Co.*, 4 Hun, 808; *Grethen v. R. R. Co.*, 22 Fed. Rep. 609; *Hughes v. R. R. Co.*, 67 Tex. 595.

⁵ *Tennenbrock v. R. R. Co.*, 59 Cal. 269; *Virginia Midland R. R. Co. v. Barksdale*, 82 Va. 330.

⁶ *Carter v. R. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754.

⁷ *Illinois etc. R. R. Co. v. Hutchinson*, 47 Ill. 408; *Felder v. R. R. Co.*, 2 McMull. 403; *Richardson v. R. R. Co.*, 8 Rich. 120; *Herring v. R. R. Co.*, 10 Ired. 402; *Manly v. R. R. Co.*, 74 N. C. 655.

⁸ *Id.* As to person slightly drunk, see *Indianapolis etc. R. R. Co. v. Galbreath*, 63 Ill. 436.

⁹ *Ostertag v. R. R. Co.*, 64 Mo. 421; *Chicago etc. R. R. Co. v. Dewey*, 26 Ill. 255; 79 Am. Dec. 374; *Chicago etc. R. R. Co. v. Coss*, 73 Ill. 394; *Gahagan v. R. R. Co.*, 1 Allen, 187;

or to stand between two tracks while a train passes.¹ That the company did not fence its road is immaterial; the statute as to fencing is for the benefit of dumb animals, not persons.² The omission to give the signals required by law at a public crossing is not evidence of negligence in a suit by a person injured upon the track beyond such crossing. The statute is for the benefit only of persons traveling upon the highway, and coming upon the track at such public crossing.³ By statute in Tennessee a railroad is required to keep a lookout for persons on the track, and to employ every possible means to prevent such accidents, and the burden of proof that it has done all required of it is on the railroad.⁴

ILLUSTRATIONS.—A portable wood-sawing machine belonging to a railway company was, by direction of its station-agent, fastened upon the rails of its track. A man was placed there at work. Trains did not pass frequently, and the person operating the machine depended upon his knowledge of the running of trains to remove it out of the way. A train belonging to a company having a right of way over the track collided with the machine, injuring the plaintiff. *Held*, that these circumstances demonstrated such negligence on the part of the plaintiff that he was not entitled to recover, even though the defendant's negligence concurred in the injury: *Railroad Company v. Norton*, 24 Pa. St. 465. A person in avoiding a runaway team stepped upon a railroad track and was injured by a hand-car, through the foreman's neglect seasonably to order the brakes to be applied. *Held*, that the railroad company was liable for the injury: *Moore v. R. R. Co.*, 47 Iowa, 689. An infant six or seven years old lying insensible or asleep on a railroad track, near a highway crossing, was injured by a train. He was perceived by the fireman and engineer in time to stop, but they supposed him a bunch of leaves or weeds, until too late. No warning signal was given. His parents had forbidden

McMahon v. R. R. Co., 39 Md. 438;
Levis v. R. R. Co., 38 Md. 588; 17
Am. Rep. 521; Central etc. R. R.
Co. v. Dixon, 42 Ga. 327; Stillson v.
R. R. Co., 67 Mo. 671.

¹ Moore v. R. R. Co., 108 Pa. St. 349.

² Lehey v. R. R. Co., 4 Robt. 204;
Van Schaick v. R. R. Co., 43 N. Y.
527.

³ Harty v. R. R. Co., 42 N. Y. 468;
Elwood v. R. R. Co., 4 Hun, 808;
Philadelphia etc. R. R. Co. v. Spearen,
47 Pa. St. 300; 86 Am. Dec. 544;
O'Donnell v. R. R. Co., 6 R. I. 211;
Holmes v. R. & B. Co., 37 Ga. 593.

⁴ Thompson and Steger's Stats., secs.
1166, 1168.

him to go on the track. *Held*, that a recovery was warranted: *Meeks v. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67. A boy five or six years old went for his own amusement on the platform of a railway station, and stood at the edge to watch an approaching train. The train drew up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, struck and injured him. *Held*, that he could not recover therefor: *Baltimore R. R. Co. v. Schwindling*, 101 Pa. St. 258; 47 Am. Rep. 706. An engineer, seeing nothing on the track, though he saw children near it, and a woman running toward the train and waving her hands, made no effort to stop the train until when within a few feet he saw a child, but too late to prevent running over it, as he might have done had he slackened speed when he saw the woman. *Held*, that the company was liable even though the child's parents were negligent in letting it play so near the track: *Donahoe v. R. R. Co.*, 83 Mo. 543; 53 Am. Rep. 594. The body of a person who had been run down by an express train at night was brought to a station near at hand, and by the station-master placed upon some rubbish in a warehouse, on the supposition that life was extinct, without examination by a physician, although the propriety of such examination was suggested to the company's agents. In the morning it appeared that the injured man had revived during the night, and dragged himself a considerable distance along the floor, where he was found dead, with his body yet warm, in a stooping posture, pressing his hand upon his leg to stop the flow of blood from an artery which had been cut. There was evidence that he bled to death for lack of assistance. *Held*, that even though the accident was caused by the negligence of the deceased, it was proper to submit to the jury whether his death did not result from the subsequent neglect of defendant's servants: *Northern etc. R. R. Co. v. State*, 29 Md. 420; 96 Am. Dec. 545.

§ 1193. Persons on Track by Express Permission. — Where persons are lawfully upon the track with the express permission of the company, the latter is obliged to use due care and vigilance to prevent injury to them.¹ Thus persons engaged in repairing or laying a track, or otherwise at work on the right of way, have a right to rely upon the company giving them notice of the approach of trains.² A person having business with a railroad com-

¹ Thompson on Negligence, 461. *Barton v. R. R. Co.*, 1 Thomp. & C. As to passengers, see Bailments. 297; 56 N. Y. 660; *Stinson v. R.*

² *Haley v. R. R. Co.*, 7 Hun, 84; *R. Co.*, 32 N. Y. 333; *McWilliams v.*

pany — e. g., in loading or unloading freight — has a right to occupy a position designated by the company's agent, hazardous though it may be, relying upon the company's diligence to protect him in such position.¹

ILLUSTRATIONS. — The plaintiff had, by contract with a railroad company, the right to a certain portion of their track for loading his freight, and while so engaged, the servants of another company, which, by the sufferance of the company owning the track, was allowed to run its cars on the track where plaintiff was "*when nothing was in the way*," backed their cars against the car in which plaintiff was standing, and injured him. *Held*, that the plaintiff had a positive and exclusive right, as against the defendant company, to be on the track where he was, and that, even though the servants of defendant gave the usual signals that their train was about to move upon this side-track, as there was ample room for both, the plaintiff had a right to presume that their train would move no farther up the track than it lawfully might: *New Orleans etc. R. R. Co. v. Bailey*, 40 Miss. 395. Plaintiff, with two other persons, was engaged in repairing the track of a railroad. A freight train was backing towards them, but they did not perceive it; when nearly upon them they were aroused by the shouts of the brakeman, and jumped from the track they were working on to an adjoining one, and waited for the train to pass. At the same time the cars had been uncoupled from another train, and, moving by their own momentum along the track upon which the plaintiff was standing, ran over and injured him. No person was on the uncoupled cars to give warning of their approach, and they were not seen by the plaintiff until he was struck. *Held*, that the railroad was liable: *Chicago etc. R. R. Co. v. Dignan*, 56 Ill. 487.

§ 1194. Persons on Track by License or Custom. —

Where it appears that the track of a railroad company has been used for purposes of travel by pedestrians, with the permission, express or implied, of the company, such circumstance enhances the duty of servants of the corporation to exercise caution and prudence in the operation of their road at this place.² If the public, with the knowl-

Detroit etc. Co., 31 Mich. 274; Goodfellow v. R. R. Co., 106 Mass. 461; Schultz v. R. R. Co., 44 Wis. 638.

¹Newson v. R. R. Co., 29 N. Y. 383.

²Illinois etc. R. R. Co. v. Hammer, 72 Ill. 347; Murphy v. R. R. Co., 45 Iowa, 661; 38 Iowa, 539; Harty v. R. R. Co., 42 N. Y. 468; Brown v. R. R.

edge and acquiescence of a railroad company, have been long and constantly accustomed to walk upon its track, although it is a statutory offense to walk upon a railroad track, it amounts to a license, and the company is liable to one injured while so walking, by the negligent act or omission of its servants.¹ But some cases hold that the railroad owes no more duty towards bare licensees than it does towards trespassers.²

ILLUSTRATIONS. — The direct and usual path to a railroad depot is over a switch on which freight-cars frequently stand with an opening habitually left between them so as to leave the path unobstructed. This path is constantly used by persons getting off and on at the depot, without such use being at any time discountenanced by the company or its officials, to whom it is known. *Held*, that if a person in passing between the cars is injured by the cars being suddenly and without warning run together, the company is liable in damages for the injury: *Nichols v. R. R. Co.*, 83 Va. 99; 5 Am. St. Rep. 257. A man walking on a path near the track, and on the right of way of the railroad, was injured by being hit by a cow, which, being on the track, was struck by the train, and thrown in the air. *Held*, that the railroad was liable: *Alabama etc. R. R. Co. v. Chapman*, 83 Ala. 453.

Co., 50 Mo. 461; 11 Am. Rep. 420; *Kansas etc. R. R. Co. v. Pointer*, 9 Kan. 620; 14 Kan. 38; *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St. 33; *Daley v. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *Slattery v. R. R. Co.*, 3 App. Cas. 1155; *Davis v. R. R. Co.*, 58 Wis. 646; 46 Am. Rep. 667; *Barry v. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; *Taylor v. R. R. Co.*, 113 Pa. St. 162; 57 Am. Rep. 446; *Dublin etc. R. R. Co. v. Slattery*, 3 App. Cas. 1155; *Byrne v. R. R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; *Wright v. R. R. Co.*, 142 Mass. 296; *Kansas Pacific R. R. Co. v. Ward*, 4 Col. 30; *Harriman v. R. R. Co.*, 45 Ohio St. 11; 4 Am. St. Rep. 507. As to injuries to passengers on platforms and tracks, see *Bailments — Carriers*.

¹ *Davis v. R. R. Co.*, 58 Wis. 646; 46 Am. Rep. 667; *Townley v. R. R.*

Co., 53 Wis. 626; *Western etc. R. R. Co. v. Meigs*, 74 Ga. 857; *Barry v. R. R. Co.*, 92 N. Y. 239; 44 Am. Rep. 377; *McDermott v. R. R. Co.*, 28 Hun, 325.

² *Gaynor v. R. R. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Illinois etc. R. R. Co. v. Hetherington*, 83 Ill. 510; *Jeffersonville etc. R. R. Co. v. Goldsmith*, 47 Ind. 43; *Finlayson v. R. R. Co.*, 1 Dill. 579; *Bancroft v. R. R. Co.*, 97 Mass. 276; *Illinois etc. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 478; *Pennsylvania etc. R. R. Co. v. Lewis*, 79 Pa. St. 33; *Sutton v. R. R. Co.*, 4 Hun, 760; 66 N. Y. 243; *O'Donnell v. R. R. Co.*, 7 Mo. App. 190; *Hoover v. R. R. Co.*, 61 Tex. 503; *Baltimore etc. R. R. Co. v. State*, 62 Md. 479; 50 Am. Dec. 233; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375.

CHAPTER LXII.

CONTRIBUTORY NEGLIGENCE.

- § 1195. Contributory negligence of plaintiff a bar.
- § 1196. Damage not apportioned.
- § 1197. Requisites of contributory negligence — Want of ordinary care.
- § 1198. Must be proximate cause of injury.
- § 1199. Where defendant's act willful or wanton.
- § 1200. What not contributory negligence — Failing to anticipate another's fault or wrongful act.
- § 1201. Plaintiff's want of care produced by defendant's wrong.
- § 1202. Intoxication.
- § 1203. Acting erroneously through sudden fear.
- § 1204. Endeavoring to save life of another.
- § 1205. Rule of "comparative negligence" — Illinois — Georgia — Kansas.
- § 1206. Rule where plaintiff a law-breaker.
- § 1207. Rule where plaintiff a trespasser.
- § 1208. Contributory negligence of children and persons *non sui juris*.
- § 1209. Injury to trespassing children.
- § 1210. Imputed negligence of parents and guardians.
- § 1211. Imputed negligence in other cases.
- § 1212. Burden of proof of contributory negligence.

§ 1195. Contributory Negligence of Plaintiff a Bar. —

If the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof. If both parties were in fault, the plaintiff cannot recover damages, for "the law has no scales to determine, in such cases, whose wrongdoing weighed most in the compound that occasioned the mischief."¹

¹ Little Schuylkill etc. R. R. Co. v. Norton, 24 Pa. St. 469; 64 Am. Dec. 673; Tuff v. Warman, 5 Com. B., N. S., 585; Davies v. Mann, 10 Mees. & W. 545; Simpson v. Hand, 6 Whart. 311; 36 Am. Dec. 231; Butterfield v. Forrester, 11 East, 60; Forks Township v. King, 84 Pa. St. 230; Nor. Cent. R. R. Co. v. Price, 29 Md. 420; Frech v. R. R. Co., 39 Md. 574; Lewis v. R. R. Co., 38 Md. 588; 17 Am. Rep. 521; Baltimore etc. R. R. Co. v. Mulligan, 45 Md. 486; Trow v. R. R. Co., 24 Vt. 487; 58 Am. Dec. 191; Needham v. R. R. Co., 37 Cal. 469; Hearne v. R. R. Co., 50 Cal. 482; Barnes v. Cole, 21 Wend. 188;

"The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other is not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct. It is obvious, then, that it can make no difference against whom his fault was primarily committed. If he has suffered in consequence of

- Johnson v. R. R. Co.*, 20 N. Y. 65; 75 Am. Dec. 375; *Gray v. R. R. Co.*, 65 N. Y. 561; *Steves v. R. R. Co.*, 18 N. Y. 422; *Dufer v. Cully*, 3 Or. 377; *Lucas v. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Smith v. Smith*, 2 Pick. 621; 13 Am. Dec. 464; *Farnum v. Concord*, 2 N. H. 392; *Murch v. R. R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *State v. R. R. Co.*, 52 N. H. 528; *Moore v. R. R. Co.*, 24 N. J. L. 268; *Central R. R. Co. v. Moore*, 24 N. J. L. 824; *Telfer v. R. R. Co.*, 30 N. J. L. 188; *Central R. R. Co. v. Van Horn*, 38 N. J. L. 138; *Garmon v. Bangor*, 38 Me. 448; *Timmons v. R. R. Co.*, 6 Ohio St. 135; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570; *Sandusky etc. R. R. Co. v. Sloan*, 27 Ohio St. 341; *Williams v. R. R. Co.*, 2 Mich. 259; 55 Am. Dec. 59; *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274; *Mich. Cent. R. R. Co. v. Campau*, 35 Mich. 468; *New Haven etc. R. R. Co. v. Vanderbilt*, 16 Conn. 420; *Birge v. Gardner*, 19 Conn. 507; 50 Am. Dec. 261; *Beers v. R. R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 339; *Jackson v. Commissioners etc.*, 76 N. C. 282; *Donaldson v. R. R. Co.*, 21 Minn. 293; *Brown v. R. R. Co.*, 22 Minn. 165; *Erd v. St. Paul*, 27 Minn. 443; *New Orleans etc. R. R. Co. v. Hughes*, 49 Miss. 258; *Memphis etc. R. R. Co. v. Thomas*, 51 Miss. 637; *Paducah etc. R. R. Co. v. Hoehl*, 12 Bush, 41; *Koutz v. R. R. Co.*, 54 Ind. 515; *Johnson v. R. R. Co.*, 27 La. Ann. 53; *Knight v. R. R. Co.*, 23 La. Ann. 462; *Laicher v. R. R. Co.*, 23 La. Ann. 320; *Coombs v. Parrington*, 42 Me. 332; *Munger v. R. R. Co.*, 4 N. Y. 349; 53 Am. Dec. 384; *Thrings v. R. R. Co.*, 7 Robt. 616; *Morris v. Phelps*, 2 Hilt. 38; *Collins v. R. R. Co.*, 12 Barb. 492; *Johnson v. R. R. Co.*, 20 N. Y. 73; 75 Am. Dec. 375; *Wilds v. R. R. Co.*, 24 N. Y. 430; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390; *Monongahela City v. Fischer*, 111 Pa. St. 9; 56 Am. Rep. 241; *Bush v. Brainard*, 1 Cow. 78; 13 Am. Dec. 513; *Washburn v. Tracy*, 2 D. Chip. 128; 15 Am. Dec. 661; *Fleytas v. R. R. Co.*, 18 La. 339; 36 Am. Dec. 658; *Brown v. Maxwell*, 6 Hill, 592; 41 Am. Dec. 771; *Irwin v. Sprigg*, 6 Gill, 200; 46 Am. Dec. 667; *Beatty v. Gilmore*, 16 Pa. St. 463; 55 Am. Dec. 514; *Reeves v. R. R. Co.*, 30 Pa. St. 454; 72 Am. Dec. 713; *Chapman v. R. R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344; *Milwaukee etc. R. R. Co. v. Hunter*, 11 Wis. 160; 78 Am. Dec. 699; *Chicago etc. R. R. Co. v. Dewey*, 26 Ill. 255; 79 Am. Dec. 374; *Heil v. Glanding*, 42 Pa. St. 493; 82 Am. Dec. 537; *State v. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600; *Baltimore etc. R. R. Co. v. Breinig*, 25 Md. 378; 90 Am. Dec. 49; *Beisiegel v. R. R. Co.*, 34 N. Y. 622; 90 Am. Dec. 741; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Baltimore etc. R. R. Co. v. State*, 29 Md. 252; 96 Am. Dec. 528; *North Cent. R. R. Co. v. State*, 31 Md. 357; 100 Am. Dec. 69; *Griggs v. Fleckenstein*, 14 Minn. 81; 100 Am. Dec. 199; *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180; *Zimmerman v. R. R. Co.*, 71 Mo. 476; *Wood v. Jones*, 34 La. Ann. 1086.

his own fault, the law gives him no remedy.”¹ Thus where one in leaving a ferry-boat puts himself in so dense a crowd that he cannot see to his footing, and gets his foot crushed, he is guilty of contributory negligence;² so is one who stands so near the edge of a wharf as to be likely to be forced off by passing teams;³ so is one who leaves his horse and wagon in a similar position;⁴ so is one who walks with his eyes open into an unguarded hole;⁵ so is a servant who used tools he knows to be defective.⁶ So no action can be maintained by an administrator for the death of his intestate caused by intoxicating liquor sold him by the defendant;⁷ nor by a wife in a similar case, where she knows that her husband has purchased a jug of whisky, and is drinking immoderately, and has it in her power to prevent him, by breaking the jug, or pouring out its contents, and is not prevented from doing so through fear, but permits him to use it in great excess.⁸ Where a person returns to the owner a gun which he has heavily loaded, for the purpose of having the latter kicked by its discharge, and such owner finds out its condition, but nevertheless discharges it, the act of the borrower is not the proximate cause of the injury resulting to the owner from such discharge.⁹ The same degree of care is required of a woman as of a man.¹⁰ A special statute relieving a contractor from all liability to the government will not be adjudged to relieve him from the legal effect of his own negligence when he is seeking damages.¹¹

ILLUSTRATIONS.—The plaintiff left for several months a loaded gun, resembling a walking-cane, in her yard. It was taken up by the servant (slave) of the defendant, a boy about fourteen years old, in whose hands it went off, and killed the

¹ *Heil v. Glanding*, 42 Pa. St. 493.

² *Dwyer v. R. R. Co.*, 47 N. J. L. 9.

³ *Cunningham v. Lyness*, 22 Wis. 245.

⁴ *Morris v. Phelps*, 2 Hilt. 38.

⁵ *Taylor v. Carew Mfg Co.*, 143 Mass. 470.

⁶ *Marsh v. Chickering*, 101 N. Y. 396.

⁷ *King v. Henkie*, 80 Ala. 505; 60

Am. Rep. 119.

⁸ *Reget v. Bell*, 77 Ill. 593.

⁹ *Smith v. Thomas*, 23 Ind. 69.

¹⁰ *Hassenyer v. R. R. Co.*, 48 Mich. 205; 42 Am. Rep. 470.

¹¹ *Henegan v. United States*, 17 Ct. of Cl. 273.

plaintiff's slave. *Held*, that the negligence of the plaintiff precluded her from recovering damages: *Audige v. Gaillard*, 8 La. Ann. 71. A railroad section-hand froze his feet, when by keeping in motion or going to a fire provided he might have avoided it. *Held*, that he had no right of action against the railroad company employing him: *Farmer v. R. R. Co.*, 67 Iowa, 136. A undertook to pull outward a sliding door of a freight-car, to which he had a right of access, and it fell on him. *Held*, that he had no right of action against the railroad company: *Kleimenhagen v. R. R. Co.*, 65 Wis. 66. B left his horse standing in a passage-way from a street to a ferry while he went into a urinal. The horse took fright, ran down the passage, and into the river, the chain being up, and not down as it should have been. *Held*, that B's negligence precluded his recovery from the ferry company: *Hoboken Land and Improvement Co. v. Lahey*, 48 N. J. L. 604. A had supervised the placing of a telegraph-pole four or five feet into the earth, and knew of a subsequent grading down, leaving it only a foot therein. *Held*, to be guilty of contributory negligence in climbing it with spikes to detach the wires: *Matthews v. St. Louis Grain Elevator Co.*, 59 Mo. 474. A photographer ordered of a dealer a quantity of hyposulphate of soda. The dealer, by mistake, gave him sulphate of iron. His servant put some of it in a solution and spoiled a number of pictures. Very slight attention would have shown the servant that it was not what had been ordered. *Held*, that the master could not recover damages: *Van Lien v. Scoville Manufacturing Co.*, 14 Abb. Pr., N. S., 74. In his cellar a merchant kept three jars of a liquid used in cleaning silver. Two of the jars contained water, and the third cyanite of potassium. The last jar was labeled poison, and had on it a skull and cross-bones. A workman, employed by the owner of the building in making repairs, drank of the latter jar, believing it to be water, and died from the effect of the poison. *Held*, that the plaintiff could not recover: *Callahan v. Warne*, 40 Mo. 131. Plaintiff stepped into an elevator opening on a ground floor and was injured by the descending elevator. He was familiar with the premises, and should have observed that the opening was not a door, as he supposed. *Held*, that his negligence precluded his right of action: *Hutchins v. Priestly Express Wagon etc. Co.*, 61 Mich. 252. A, going to the warehouse of a railroad company after goods, stops his wagon on the track nearest the platform, and next to the main track, over which the mail train passes, and so near there as to be in the way of the engine. The train comes along and damages A's wagon. *Held*, that A has been guilty of contributory negligence, and cannot recover damages of the company: *Murphy v. R. R. Co.*, 70 N. C. 437. The driver of a carriage suffers his team to stand

unhitched near a railway track, he at the same time standing near the door of the carriage, without the reins in his hands, reading a newspaper. An engine comes along, driving a snow-plow, which throws mud into the carriage and frightens the horses, causing them to run away. *Held*, that the negligence of the driver bars an action for damages on the part of the owner of the carriage: *Gray v. R. R. Co.*, 2 Jones & S. 519. The servant of the plaintiff drove the plaintiff's team to the defendant's warehouse and wharf, and hitched the horses to a clog, but wound his lines round the hub of his wagon, so that when the horses backed the lines became shortened, by which means the horses were caused to back into the river, where they were drowned, and the wagon and harness lost. *Held*, that the plaintiff could not recover damages of the defendant for failing to provide his premises with hitching-posts, on account of the contributory negligence of his servant: *Buckingham v. Fisher*, 70 Ill. 121. A suffers his horse to run at large in violation of law, knowing that there is a dangerous excavation in an unused street of the city, which the city has suffered to remain without being filled up. The horse falls into the excavation and is killed. *Held*, that A cannot recover damages of the city: *Gribble v. Sioux City*, 38 Iowa, 390. The building of A has a projecting roof, which casts water upon the land of B. This water so weakens the wall of B's house that it falls, and in falling injures the building of A. A's tenant cannot recover damages of B; for this injury was the result of his own contributory negligence in suffering the building of which he was tenant to remain in a condition to produce such an injury to B's building: *Martin v. Simpson*, 6 Allen, 102. A boiler-maker was sent by his employer to repair the boiler in a manufacturing establishment. He directed the closing of a ventilator attached to the boiler. This produced an accumulation of foul air, which on his return from his dinner caused his death. *Held*, that his negligence barred a recovery: *Curran v. Warren Chemical Works*, 36 N. Y. 153.

§ 1196. Contributory Negligence is a Bar — Damage not Apportioned. — Unlike the rule in admiralty, where, in cases of collision, if both vessels are in fault, the loss is equally divided between the owners of each or in suits for personal injuries,¹—in courts of law, where contributory negligence exists, the loss is never apportioned: it is a bar—a complete defense—to the action, and is not taken into

¹ The *Max Morris*, 24 Fed. Rep. 860.

account in mitigation of damages.¹ But this principle does not apply where the injury produced by the plaintiff's negligence is capable of a distinct separation and apportionment from that produced by the defendant's negligence. Here it should be excluded by the jury in estimating the damages, and they may assess against the defendant those damages which flowed separately from his act.² So where each party by his negligence actively contributes to the injury at the time of its commission there can be no recovery; but if there is a mere passive fault or negligence on the part of the plaintiff, he may recover, if the defendant fails to exercise ordinary care and prudence in order to avoid doing him a wrong.³ And defendant may introduce evidence to prove contributory negligence of plaintiff for the purpose of reducing the damages to a nominal sum, upon a hearing in damages after the overruling of the defendant's demurrer to a declaration charging an injury by his negligence.⁴

§ 1197. Requisites of Contributory Negligence—Want of Ordinary Care.—It is not any slight negligence contributory to the injury which will prevent the plaintiff from recovering damages for a negligent injury caused by another.⁵ The plaintiff is barred from recovering damages only where the injury could have been avoided by the exercise of ordinary or reasonable care on his

¹ Thompson on Negligence, 1162; Cooley on Torts, 674. But see *contra*, Wright v. R. R. Co., 20 Iowa, 195; Nashville etc. R. R. Co. v. Smith, 6 Heisk. 174; Flanders v. Meath, 27 Ga. 358; Atlanta etc. R. R. Co. v. Ayers, 53 Ga. 12; Dush v. Fitzhugh, 2 Lea, 307; Atlanta etc. R. R. Co. v. Wyly, 65 Ga. 120.

² Thomas v. Kenyon, 1 Daly, 132.

³ Adams v. Ferry Co., 27 Mo. 95; 72 Am. Dec. 247.

⁴ Daily v. R. R. Co., 32 Conn. 356; 87 Am. Dec. 176.

⁵ Mabley v. Kittleberger, 37 Mich. 92.

360; Daniels v. Clegg, 28 Mich. 32; Galena etc. R. R. Co. v. Jacobs, 20 Ill. 478; Cremer v. Portland, 36 Wis. 92. "It is not the law that slight negligence on the part of the plaintiff will defeat the action. Slight negligence is the want of extraordinary care and prudence; and the law does not require of a person injured by the carelessness of others the exercise of that high degree of caution as a condition precedent to his right to recover damages for the injuries thus sustained": Cremer v. R. R. Co., 36 Wis. 92.

part.¹ The want of a superior degree of care or diligence cannot be set up as a bar to the action.² The plaintiff, to show that he was not negligent, may show that he did as men usually do in like circumstances.³

§ 1198. Must have been Proximate Cause of Injury.

— The negligence of the plaintiff, in order to bar a recovery, must have been a proximate cause of the injury complained of.⁴ If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant ought to have avoided the injury by ordinary care.⁵ But if a want of ordinary care on the part of the person injured concurs as a proximate cause in producing the injury, the defendant is not liable, although in fault.⁶

¹ *Brown v. R. R. Co.*, 22 Minn. 165; *Cox v. Westchester Turnpike Road*, 33 Barb. 414; *Baxter v. R. R. Co.*, 3 Rob. (N. Y.) 510; *Jacobs v. Duke*, 1 E. D. Smith, 271; *O'Brien v. R. R. Co.*, 3 Phila. 76; *Nashville etc. R. R. Co. v. Carroll*, 6 Heisk. 347; *Cremer v. Portland*, 36 Wis. 92, 99; *Marble v. Ross*, 124 Mass. 44; *Ohio etc. R. R. Co. v. Gullett*, 15 Ind. 487; *Springett v. Ball*, 4 Fost. & F. 472; *Irwin v. Sprigg*, 6 Gill, 200; 46 Am. Dec. 667; *Crommelin v. Cox*, 30 Ala. 318, 329; 68 Am. Dec. 120; *Williams v. Clinton*, 28 Conn. 266; *Fox v. Glastenbury*, 29 Conn. 204; *Birge v. Gardiner*, 19 Conn. 507; 50 Am. Dec. 261; *Daley v. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; 2 Am. L. T., N. S., 211; *Indianapolis etc. R. R. v. Stout*, 53 Ind. 143, 149; *Muldowney v. R. R. Co.*, 39 Iowa, 615; *Little v. McGuire*, 43 Iowa, 447; 38 Iowa, 562; *Kansas Pacific R. R. Co. v. Pointer*, 14 Kan. 37; 9 Kan. 620; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81.

² *Whirley v. Whiteman*, 1 Head, 610.

³ *Whitsett v. R. R. Co.*, 67 Iowa, 150.

⁴ *Thompson on Negligence*, 1151;

Tuff v. Warman, 2 Com. B., N. S., 740; 5 Com. B., N. S., 573; *State v. R. R. Co.*, 52 N. H. 528; *Foster v. Holly*, 38 Ala. 76, 85; *Flynn v. R. R. Co.*, 40 Cal. 14; 6 Am. Rep. 595; *Needham v. R. R. Co.*, 37 Cal. 409; *Kline v. R. R. Co.*, 37 Cal. 400; 39 Cal. 587; 99 Am. Dec. 282; *Isbell v. R. R. Co.* 27 Conn. 393; 71 Am. Dec. 78; *Churchill v. Rosebeck*, 15 Conn. 359; *Dyer v. Talcott*, 16 Ill. 300; *Northern Central R. R. Co. v. Price*, 29 Md. 420; *Meyer v. R. R. Co.*, 43 Mo. 523; *Walsh v. Mississippi Trans. Co.*, 52 Mo. 434; *Whalen v. R. R. Co.*, 60 Mo. 323; *Lannen v. Albany Gas-light Co.*, 44 N. Y. 459; *Byram v. McGuire*, 3 Head, 530; *Union Pacific R. R. Co. v. Rollins*, 5 Kan. 167; *Caulkins v. Mathews*, 5 Kan. 191; *Sawyer v. Sauer*, 10 Kan. 466; *Cummins v. Presley*, 4 Harr. (Del.) 315. And see *ante*, Proximate and Remote Cause.

⁵ *Tuff v. Warman*, 2 Com. B., N. S., 740; *Day v. Crossman*, 4 Thomp. & C. 122; *Doggett v. R. R. Co.*, 78 N. C. 305; *State v. R. R. Co.* 52 N. H. 528.

⁶ *Robinson v. R. R. Co.*, 48 Cal. 409; *Hearne v. R. R. Co.*, 50 Cal. 482; *Williams v. Clinton*, 28 Conn. 266; *McAulich v. R. R. Co.*, 20 Iowa, 338, 346; *Spencer v. R. R. Co.*, 29 Iowa, 55; *Artz v. R. R. Co.*, 38 Iowa, 293; *Schaabs v.*

§ 1199. Where Defendant's Act is Willful or Reckless. — Where the conduct of the defendant is wanton and willful, or where it indicates a reckless indifference to the rights of others, the doctrine of contributory negligence does not apply, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury.¹ Where the defendant discovers the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and does not make use of such care for the purpose, he is chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection.² Thus if the engineer of a train, on discovering a boy on the track, fails to do that which he might do to avoid striking him, and recklessly and wantonly goes on, the company is liable.³

§ 1200. What not Contributory Negligence — Failing to Anticipate Another's Fault or Wrongful Act. — One is not chargeable with contributory negligence for not anticipating that another person will violate the law in a given particular, and for not providing against such possible violations of it.⁴ "In the exercise of his lawful rights, every man has a right to act on the belief that every other

Woodburn Sarven Wheel Co., 56 Mo. 173; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 383; 97 Am. Dec. 402; *Newhouse v. Miller*, 35 Ind. 463.

¹ *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273; *Vandegrift v. Rediker*, 22 N. J. L. 185; 51 Am. Dec. 262; *Lafayette etc. R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis etc. R. R. Co. v. McClure*, 26 Ind. 370; 89 Am. Dec. 467; *Mulherrin v. R. R. Co.*, 81 Pa. St. 366; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Daley v. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *Chicago etc. R. R. Co. v. Donahue*, 75 Ill. 106; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Penn. R. R. Co. v. Sinclair*, 62 Ind. 301; 30 Am. Rep. 185; *Brannen v. Kocomo etc. Gravel Co.*, 115 Ind. 115; 7 Am. St. Rep. 411;

² *Brown v. R. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Macon etc. R. R. Co. v. Davis*, 18 Ga. 679; *State v. R. R. Co.*, 52 N. H. 528; *Cooper v. R. R. Co.*, 44 Iowa, 134; *Kerwhacker v. R. R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 246; *Richmond etc. R. R. Co. v. Anderson*, 31 Gratt. 812; 31 Am. Rep. 750; *Bergman v. R. R. Co.*, 88 Mo. 678; *Harris v. Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842.

³ *Kansas Pacific R'y Co. v. Whipple*, 39 Kan. 531.

⁴ *Damour v. Lyons*, 44 Iowa, 276; *Shea v. R. R. Co.*, 44 Cal. 414; *Robinson v. R. R. Co.*, 48 Cal. 409; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570; *Kellogg v. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69; *Fox v. Sackett*, 10 Allen, 535; 87 Am. Dec. 682.

person will perform his duty and obey the laws; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of the law on the part of some other person.”¹ Thus one crossing a railroad track has a right to assume that the usual signals of the approach of a train will be seasonably given,² and that it will not run at a speed prohibited by law.³ A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons.⁴ A foot-traveler who is blind and ignorant of the condition of the highway has a right to presume that the road is reasonably safe in its margin, surface, and muniments.⁵ In like manner a person is not himself negligent in not providing against another’s negligence merely anticipated, but not known.⁶

ILLUSTRATIONS. — A boy, who was standing with others in the street looking at an exhibition of fire-works made by another boy, was injured by a Roman-candle ball fired in the direction of the crowd. *Held*, not guilty of contributory negligence: *Bradley v. Andrews*, 51 Vt. 530. Plaintiff sued defendant for driving into plaintiff’s carriage. Defendant claimed that plaintiff, a licensed liquor-seller, had sold him liquor, which had produced intoxication, so that he could not drive properly. *Held*, no defense: *Cassady v. Magher*, 85 Ind. 228.

§ 1201. **Plaintiff’s Want of Care Produced by Defendant’s Wrong.** — The plaintiff is not barred from recovering damages on account of a want of care on his part, which

¹ *Jetter v. R. R. Co.*, 2 Keyes, 154.

² *Tabor v. R. R. Co.*, 46 Mo. 353; 2 Am. Rep. 517.

³ *Hart v. Devereux*, 41 Ohio St. 565.

⁴ *Baker v. Brendergast*, 32 Ohio St. 494; 39 Am. Rep. 620.

⁵ *Glidden v. Reading*, 38 Vt. 52; 88 Am. Dec. 639; *Salem v. Goller*, 76 Ind. 291.

⁶ *Harpell v. Curtis*, 1 E. D. Smith, 78; *Fraser v. Sears Water Co.*, 12 Cal. 555; *Brown v. Lynn*, 31 Pa. St. 510; 72 Am. Dec. 768.

want of care was produced by the defendant's own wrong.¹ One cannot take advantage of his own wrong where he has omitted to perform a duty, and by that omission another has been lulled into a fancied security, so that he goes into a dangerous place and receives an injury which he might have avoided if the other had performed his duty. Such other person in such case will not be permitted to charge contributory negligence on the injured party.²

§ 1202. **Intoxication.** — That the plaintiff was intoxicated at the time of the injury is evidence of contributory negligence, but it is not negligence *per se*,³ except in a gross case, as where a drunken man places himself or goes to sleep on a track.⁴ One who gets drunk and goes to sleep on a railroad track has no right of action against a railroad company if the engineer takes him for a log and runs over him.⁵ But if a locomotive engineer can or should see that a man walking on the track is drunk and unlikely to get out of the way, the company is liable notwithstanding his contributory negligence, if, without slackening speed, he strikes him.⁶ Unless the intoxication contributed to the injury, i. e., was the proximate cause, it will not affect the person's right of action. If

¹ Thompson on Negligence, 1173; Pennsylvania R. R. Co. v. Ogier, 35 Pa. St. 60; 78 Am. Dec. 322; Fowler v. R. R. Co., 18 W. Va. 579; Warren v. R. R. Co., 8 Allen, 227; 85 Am. Dec. 701. One was killed in attempting to crawl under a freight train standing across a street, and having a locomotive attached with steam up, evidence that the conductor called to him, "Come on under; you will have plenty of time," held, admissible upon the question of due care: Chicago etc. R. R. Co. v. Sykes, 1 Ill. App. 520.

² Pennsylvania R. R. Co. v. Ogier, 35 Pa. St. 60; 78 Am. Dec. 323.

³ Ditchett v. R. R. Co., 5 Hun, 165; Alger v. Lowell, 3 Allen, 402; Stuart v. Machias, 48 Me. 477; Cramer v.

Burlington, 42 Iowa, 315; Burns v. Elba, 32 Wis. 605; Thorp v. Brookfield, 36 Conn. 321; O'Hagan v. Dillon, 10 Jones & S. 456; Illinois etc. R. R. Co. v. Cragin, 71 Ill. 177; Baltimore etc. R. R. Co. v. Boteler, 38 Md. 568; Healy v. New York, 3 Hun, 708.

⁴ O'Keefe v. R. R. Co., 32 Iowa, 467; Whalen v. R. R. Co., 60 Mo. 323; Illinois Central R. R. Co. v. Hutchinson, 47 Ill. 408; Toledo etc. R. R. Co. v. Riley, 47 Ill. 514; Denman v. R. R. Co., 26 Minn. 357; Chicago etc. R. R. Co. v. Lewis, 5 Ill. App. 242.

⁵ Little Rock etc. R. R. Co. v. Haynes, 47 Ark. 497.

⁶ St. Louis etc. R. R. Co. v. Wilkerson, 46 Ark. 513.

the intoxication is complete, and injury results, it is negligence *per se*, but when partial, the intoxication is not the cause, but a condition of the injury,¹ because experience has shown that a man may be intoxicated and still be competent in every way to take care of himself and transact his own business;² therefore the question, Did the intoxication cause the injury? is a question of fact for the jury.³

It is not proper to charge the jury that the intoxication of deceased, if he was intoxicated, if it tended to obscure his faculties, was, under the circumstances, of itself negligence. The court said: "The deceased was bound to exercise ordinary care, whether sober or drunk. The mere fact of intoxication will not establish want of ordinary care. The jury must determine whether the intoxication contributed to the injury, and if it did not, it is of no importance, and

¹ Maguire v. R. R. Co., 115 Mass. 239; Illinois etc. R. R. Co. v. Hutchinson, 47 Ill. 408; Illinois etc. R. R. Co. v. Cragin, 71 Ill. 177; Chicago etc. R. R. Co. v. Lewis, 5 Ill. App. 242; Meyer v. R. R. Co., 40 Mo. 151; Button v. R. R. Co., 18 N. Y. 248; Healy v. New York, 3 Hun, 708; Bradley v. R. R. Co., 8 Daly, 289; Davis v. R. R. Co., 8 Or. 172; Robinson v. Pioche, 5 Cal. 460; Marquette etc. R. R. Co. v. Handford, 39 Mich. 537; Southwestern R. R. Co. v. Hankerson, 61 Ga. 114; Aurora v. Hillman, 90 Ill. 61; Houston etc. R. R. Co. v. Renson, 61 Tex. 613; Hankerson v. R. Co., 59 Ga. 593.

² Schramm v. O'Connor, 98 Ill. 539; Cooke v. Claywood, 18 Ves. 12; Shaw v. Thackray, 1 Smale & G. 537.

³ Alger v. Lowell, 3 Allen, 402; Cramer v. Burlington, 42 Iowa, 315; Burns v. Elba, 32 Wis. 605; Thorp v. Brookfield, 36 Conn. 321; Stuart v. Machiasport, 48 Me. 477; Healy v. New York, 3 Hun, 708; O'Hagan v. Dillon, 10 Jones & S. 456; Ditchett v. R. R. Co., 5 Hun, 165; R. R. Co. v. Boteler, 38 Md. 568; Seymour v. Lake, 66 Wis. 651. The presumption of sobriety makes for the plaintiff a

prima facie case; when this is overcome, the burden of proof is shifted to the plaintiff, who must establish by preponderance of testimony the fact respecting which the burden exists. It is not negligence *per se* to be on a dangerous street in a state of intoxication, but being in such a place in such a condition, the jury may find that the plaintiff was negligent; and when the jury may fairly find negligence from a state of intoxication, in order to prevent such an inference it should appear that the plaintiff was not at the time of the injury in an intoxicated condition. When it is negligence to be in a particular place in a state of intoxication, and some evidence is introduced tending to show that plaintiff was in that condition, then it must appear from a preponderance of evidence that he was not intoxicated in order that he may recover. The jury should have been instructed that if they find it negligence to be in the place intoxicated, evidence must show that he was not intoxicated, and that intoxication should not defeat recovery, if it did not contribute to the injury sustained: Cramer v. Burlington, 42 Iowa, 321.

should have no weight in the case.”¹ In a Wisconsin case, a judgment for plaintiff was reversed for an instruction to the effect that “the fact of intoxication alone” would not “prove contributory negligence,” unless the proof showed such a degree of intoxication that “imbecility would begin to affect” the intoxicated person,—such instruction being regarded as liable to mislead the jury. The court said that, in an action for injuries from negligence, if the person injured was, at the time of the injury, intoxicated in any degree, that fact is proper to be considered by the jury in determining the question of contributory negligence.² An innkeeper is liable for leaving unfastened a door leading to an unguarded awning, where a person intoxicated opened the door, walked out upon the awning, fell to the ground, and was seriously injured.³ So where the owner of a wagon left it standing on the highway with the pole projecting thereon, and a horse whose driver was intoxicated collided therewith, the owner was held liable.⁴ Where a person is injured on the highway, the fact that he is drunk does not constitute negligence *per se* on his part,⁵ but it is evidence of want of care, and negligence may be inferred from it by the jury.⁶ It has been held that a driver so intoxicated as to be unable to manage his team is not in the exercise of ordinary care, and hence his intoxication is negligence.⁷ It has been held in some cases that evidence that the plaintiff was intoxicated at other times, or was in the habit of getting drunk, is not admissible, because previous intoxication or habits of intoxication have nothing to do with the case, where the only question is whose neg-

¹ *Ditchett v. R. R. Co.*, 5 Hun, 165.

² *Fitzgerald v. Weston*, 52 Wis. 354.

³ *Camp v. Wood*, 76 N. Y. 92; 32 Am. Rep. 282.

⁴ *Ridley v. Lamb*, 10 U. C. Q. B. 354.

⁵ *Robinson v. Pioche*, 5 Cal. 460.

⁶ See *ante*, *Ditchett v. R. R. Co.*,

and cases in that note; *Cassedy v. Stockbridge*, 21 Vt. 391; *Rock Island v. Vanlandschoot*, 78 Ill. 485; *Wood v. Andes*, 11 Hun, 543; *Alger v. Lowell*, 3 Allen, 402.

⁷ *Cassedy v. Stockbridge*, 21 Vt. 391; *Rock Island v. Vanlandschoot*, 78 Ill. 485.

ligence caused the injury.¹ Other cases, on the other hand, allow such evidence, and rule that a habit of getting intoxicated raises a presumption of negligence.² The testimony of the surgeon who saw the injured person immediately after the occurrence, that he was then grossly intoxicated, is competent.³

ILLUSTRATIONS.—The plaintiff's intestate, on a dark and stormy night, while very much intoxicated, started to cross a foot-bridge after having been warned that it was unsafe, and that there was a safe bridge near at hand, and on the following morning was found dead on the ice below the bridge. *Held*, that his representative was not entitled to recover: *Wood v. Andes*, 11 Hun, 543. A drunken passenger having been carried beyond his destination, and not knowing enough to pay further fare or get off, was removed by the train hands, and placed a short distance from the track, from which place he strayed onto the track, and was killed by another train, without special negligence by the employees on that train. *Held*, that the company was not liable: *McClelland v. R. R. Co.*, 94 Ind. 276. A track-walker found a drunken man lying on the track. There was nothing in the appearance of the man to indicate that he was drunk or helpless. The track-walker told him to get off, and supposed that he would. He was struck by a train. *Held*, that the company was not liable: *Virginia Midland R. R. Co. v. Boswell*, 82 Va. 932.

§ 1203. **Acting Erronously through Sudden Fear.**—If A, through his negligence or fault, puts B in a position of immediate danger, real or apparent, and B, through a sudden impulse of fear, makes a movement to escape the danger, and in so doing accidentally receives another and different injury from that threatened by the negligence of A, he may recover damages of A; for A's neg-

¹ *Warner v. R. R. Co.*, 44 N. Y. 465; *Cleghorn v. R. R. Co.*, 56 N. Y. 44; *Robinson v. R. R. Co.*, 7 Gray, 92; *Gahagan v. R. R. Co.*, 1 Allen, 189; 79 Am. Dec. 724.

² *Caldwell v. New Jersey etc. Co.*, 47 N. Y. 282; *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Gilman v. R. R. Co.*, 13 Allen, 433; 90 Am. Dec. 210; *Laning v. R. R. Co.*, 49 N. Y. 521; 10

Am. Rep. 417. See *Cleghorn v. R. R. Co.*, 56 N. Y. 44; *Shearman and Redfield on Negligence*, sec. 601, note 3; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; *Huntington etc. R. R. Co. v. Decker*, 84 Pa. St. 419; 82 Pa. St. 119.

³ *Illinois etc. R. R. Co. v. Cragin*, 71 Ill. 177.

ligence or fault is the proximate cause of his injury.¹ B is not guilty of contributory negligence, even though had he not so acted he would not have been hurt at all.² An act which a careful person would avoid ordinarily may not be negligent when done under the impulse of a sudden fear or surprise.³ One who, through the mismanagement of the train, is alarmed, and, in his fright or anxiety, leaps from the cars, is not to be charged with contributory negligence,⁴ even though had he remained in

¹ Thompson on Negligence, 1092; *Coulter v. American Merchants' Union Express Co.*, 56 N. Y. 585; 5 Lans. 67; *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346; *Lund v. Tyngsboro*, 11 Cush. 563; 59 Am. Dec. 159; *Pittsburgh v. Grier*, 22 Pa. St. 54; *Sears v. Dennis*, 105 Mass. 310; *Card v. Ellsworth*, 65 Me. 547; 20 Am. Rep. 722; *Mark v. R. R. Co.*, 30 Minn. 493; *Galena etc. R. R. Co. v. Yarwood*, 17 Ill. 509; 65 Am. Dec. 682; *Siegrist v. Arnot*, 10 Mo. App. 197; *Collins v. Davidson*, 19 Fed. Rep. 83.

² *Stokes v. Saltonstall*, 13 Pet. 181; *Wilson v. Susquehanna Turnpike Co.*, 21 Barb. 68; *Buel v. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271; *Frink v. Potter*, 17 Ill. 406, 410; *Lund v. Tyngsboro*, 11 Cush. 563; 59 Am. Dec. 159; *Brooks v. Petersham*, 16 Gray, 181; *Cook v. Parham*, 24 Ala. 21; *Penn. R. R. Co. v. Kilgore*, 32 Pa. St. 292; 72 Am. Dec. 787; *Macon R. R. Co. v. Winn*, 26 Ga. 250. In *Wesley City Coal Co. v. Hesler*, 84 Ill. 126, the court say: "It is said there was no real danger; that the fire was readily extinguished, and had the men staid at their work, they would have suffered no harm. All this is very true. That, however, is not the hinge on which this question turns. It is equally true that men of ordinary prudence, with a full knowledge that there was but one mode of escape from this mine, hearing a cry of fire, finding the mine filling with smoke, and that from a fire burning in the main shaft at a point above them, and past which they must be carried, if they escape at all, would ordinarily be very much alarmed, and, in most

cases, lose their ordinary presence of mind. The natural consequence of such a combination of facts would be a rush of the men for the carriage at the main shaft, and in the smoke and darkness, another very probable consequence would be that some one or more of these men in this confusion would, by some misstep or the jostle of a companion, lose his footing and fall down this shaft. Had there been a second mode of escape, no such cause of alarm would have existed. Men of ordinary prudence would have felt safe, and been left to exercise their caution in avoiding accidents on their way to a sure mode of escape. It has long been settled that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm." "If a person, by a negligent breach of duty, expose a person towards whom the duty is contracted to obvious peril, the act of the latter, in endeavoring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrongdoer; and this doctrine has, we think, been rightly extended in more recent times to a 'grave inconvenience,' when the danger to which the passenger is exposed is not in itself obvious": *Field, J.*, in *Robson v. R. R. Co.*, L. R. 10 Q. B. 271.

³ *Dutzi v. Geisel*, 23 Mo. App. 676.

⁴ *Filer v. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Stevenson v. R. R. Co.*, 5 McCrary, 634.

his place the injury would not have happened.¹ Nor is a passenger who jumps from an overturning stage-coach, the wheel breaking;² nor is a horse-car passenger who precipitately rises from her seat upon seeing the defendant's steam-car approach, improperly propelled;³ nor is one who jumps from a horse-car, where the horses are running away, the driver has lost control, and there is an embankment near, over which the car is in danger of falling;⁴ nor is one who, in trying to escape a train of coal-cars, is struck by an engine coming in an opposite direction.⁵ So if a traveler, being brought into imminent peril by his near approach to a defect in the highway, leaps from his carriage in order to avoid it, and in so doing sustains an injury, he may recover damages from the town, although by remaining in his carriage he would not have been injured.⁶

ILLUSTRATIONS. — A coach suddenly breaks down, going at a moderate gait on a level road. A passenger seated upon the top, becoming alarmed, leaps to the ground, and thereby sustains an injury. If he had remained seated, he would not have been injured. *Held*, that the passenger was not guilty of contributory negligence: *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346. Defendant, who occupied a warehouse, directed his servants to throw a bag of wool out of an upper window, to save the trouble of lowering it with a crane. Before dropping the bag, one of his servants called out, warning passengers. The plaintiff looked up, saw the wool coming, and ran across the yard, thinking he would have time to escape. The wool fell on him, and injured him. *Held*, proper to tell the jury, that if the plaintiff lost his presence of mind by the act of the defendant, and, in the confusion produced by the situation in which he found himself, had run into danger, the defendant was liable: *Wooley v. Scovill*, 3 Moody & R. 105. Fire was negligently allowed to fall from a locomotive on defendant's elevated railroad upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse was frightened,

¹ *Twomley v. R. R. Co.*, 69 N. Y. 158; 25 Am. Rep. 162.

² *Lawrence v. Green*, 70 Cal. 417; 59 Am. Rep. 423.

³ *Holzab v. R. R. Co.*, 38 La. Ann. 185; 58 Am. Rep. 177.

⁴ *Dimmey v. R. R. Co.*, 27 W. Va. 32; 55 Am. Rep. 292.

⁵ *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 59.

⁶ *Lund v. Tyngsboro*, 11 Cush. 563; 59 Am. Dec. 159.

and ran away. The driver attempting to drive him against the curbstone to stop him, the wagon passed over the curbstone and injured plaintiff, who was on the sidewalk. *Held*, that he might recover without regard as to whether the driver in the emergency did the most prudent thing: *Lowery v. R. R. Co.*, 99 N. Y. 158; 52 Am. Rep. 12. Plaintiff jumped off the rear platform of a street-car to avoid the apparent danger of a collision between the car and an overtaking car. As the result of his jump he broke his leg. *Held*, that he was not necessarily precluded from maintaining an action against the street-car company, the question of whether he acted with undue rashness being for the jury: *South Cov. R. R. Co. v. Ware*, 84 Ky. 267. A laborer in a railroad yard found himself between two tracks at a moment when a train was approaching him on each track. There was space enough between the tracks to make it safe for him to stand there, had he had nerve sufficient to stand quite still. *Held*, that his right of action for injuries sustained by being struck was not necessarily defeated by these facts: **Collins v. R. R. Co.*, 55 N. Y. Sup. Ct. 31.

§ 1204. Endeavoring to Save Life of Another.—Where a person places himself in a position of great danger in an effort to save another from a sudden peril, death, or great bodily harm, though it may be negligence barring a recovery of damages for one voluntarily to place himself in a position of danger in order to save property merely, yet the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons; and whether the conduct of a person injured in such an attempt was rash will be a question for the jury.¹ A mother who is injured by falling into an open hatchway while trying to prevent her four-year-old child, who has stumbled, from falling therein, is not necessarily guilty of contributory negli-

¹ Thompson on Negligence, 1174; *Eckert v. R. R. Co.*, 43 N. Y. 503; 3 Am. Rep. 721. "Emergencies may sometimes be given in evidence, and will justify what would otherwise be an indefensible act; such, for instance, as that of an engineer standing at his post in the endeavor to save the lives

of the passengers or others when a collision is imminent, or of a person rushing in front of an engine to save the life of a child, or placing himself in a position of danger to save the life of another": *Harris v. Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842.

gence, although the hatchway was reasonably guarded.¹ Nor is it contributory negligence in a mother to attempt to rescue her infant child from an approaching railroad train, although she may have negligently allowed it to go on the track. But the defendant is not chargeable, unless it is negligent in respect to the child before, or in respect to the mother or child, after, the attempt at rescue.² In Massachusetts, in a recent case, it was ruled that where a person, while walking along a street in a city, hears a cry for help, and sees a man on the ground being gored by a bull, attached to him by a rope, and approaches, but does not attempt to assist the man, because he is afraid of the bull, and the bull attacks and injures him, the question, in an action for such injury, whether he was in the exercise of due care, is for the jury, and he is not *per se* guilty of contributory negligence.³ One voluntarily exposing himself to danger in order to save his property from a fire caused by another's negligence cannot recover therefor.⁴

¹ Clark v. Famous, 16 Mo. App. 463.

² Donahoe v. R. R. Co., 83 Mo. 560; 53 Am. Rep. 594.

³ Linnehan v. Sampson, 126 Mass. 506; 30 Am. Rep. 692, the court saying: "A question was raised at the trial as to contributory negligence on the part of the plaintiff, and it was contended that he was not in the exercise of reasonable care in approaching so near to the bull as he did, and that the calls of humanity would be no excuse. But the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was submitted to the jury, as a question peculiarly for them to decide. They were to consider all the circumstances, and among other things, that the life of a fellow-creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which the plaintiff must prove. It does not follow as a matter of law that in encountering the danger he was necessarily guilty

of a want of due and reasonable care. The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment: Buel v. R. R. Co., 31 N. Y. 314. In Eckert v. R. R. Co., 43 N. Y. 502, a case of the rescue of a child from being run over by an approaching train, the court say that the 'law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.' The law does not require cowardice or absolute inaction in such a state of things. Neither does it require in such an emergency that the plaintiff should have acted with entire self-possession; or that he should have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness."

⁴ Cook v. Johnson, 58 Mich. 437; 55 Am. Rep. 703.

ILLUSTRATIONS. — The deceased, seeing a little child on a railroad track, and a train swiftly approaching, so that the child would be almost instantly crushed unless an immediate effort was made to save it, rushed upon the track for that purpose, and succeeded in saving the child, but was himself run over and killed. *Held*, that his voluntarily exposing himself to the danger for the purpose of saving the child's life was not, as matter of law, negligence on his part precluding a recovery: *Eckert v. R. R. Co.*, 43 N. Y. 503; 3 Am. Rep. 721. Plaintiff was walking with his father up a railroad track, down which a train was moving at the rate of about four miles an hour, in full sight. They crossed an unplanked bridge, but the train came upon them before the father had cleared the bridge, the son stepped back to help him off the bridge and succeeded, but lost his own leg in the act; the engineer reversed his engine and took all means to avoid an injury. *Held*, that the company was not liable: *Evansville etc. R. R. Co. v. Hiatt*, 17 Ind. 102.

§ 1205. Rule of "Comparative Negligence" in Illinois, Georgia, and Kansas. — What is called the doctrine of "comparative negligence" prevails in Illinois, and perhaps Georgia and Kansas. This doctrine, says Judge Thompson,¹ is in Illinois reduced to a definite formula, which may be stated thus: If, on comparing the negligence of the plaintiff with that of the defendant, or the negligence of the person injured with that of the person inflicting the injury, the former is found to have been slight, and the latter gross, the plaintiff may recover.² In

¹ Thompson on Negligence, 1168.

² *Chicago etc. R.R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 306; *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago etc. R. R. v. Dewey*, 26 Ill. 255; 79 Am. Dec. 374; *Chicago etc. R. R. Co. v. Gretzner*, 46 Ill. 74; *Chicago etc. R. R. Co. v. Triplett*, 38 Ill. 482; *Ortmayer v. Johnson*, 45 Ill. 469; *Ohio etc. R. R. Co. v. Shanefelt*, 47 Ill. 497; 95 Am. Dec. 504; *Chicago etc. R. R. Co. v. Sweeney*, 52 Ill. 325; *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 272; *Chicago etc. R. R. Co. v. Dunn*, 61 Ill. 385; *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Chicago etc. R. R. Co. v. Murray*, 62 Ill. 326; *Toledo etc. R. R. Co. v. Spen-*

cer, 66 Ill. 528; *Illinois etc. R. R. Co. v. Maffit*, 67 Ill. 431; *Chicago etc. R. R. Co. v. Van Patten*, 64 Ill. 510; *Rockford etc. R. R. v. Hillmer*, 72 Ill. 235; *Pittsburgh etc. R. R. Co. v. Knutson*, 69 Ill. 103; *Illinois etc. R. R. Co. v. Cragin*, 71 Ill. 177; *Chicago etc. R. R. Co. v. Lee*, 68 Ill. 576; 60 Ill. 501; *St. Louis etc. R. R. Co. v. Manly*, 58 Ill. 300; *Chicago etc. R.R. Co. v. Coss*, 73 Ill. 394; *Toledo etc. R. R. Co. v. O'Connor*, 77 Ill. 391; *Kewannee v. Depew*, 80 Ill. 119; *Schmidt v. Chicago etc. R. R. Co.*, 83 Ill. 405; *Wabash R. R. Co. v. Henks*, 91 Ill. 406; *Ohio etc. R. R. Co. v. Porter*, 92 Ill. 437; *North Chicago R. R. Co. v. Monka*, 4 Ill. App. 664; *Winchester v. Case*, 5 Ill. App. 486; *Chicago etc.*

Georgia, the rule seems to be not essentially different from that in Illinois. "It is this, that although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent, and thereby occasioned or did not prevent the mischief, the action may be maintained."¹ The rule in Kansas is thus stated: It is not necessary, in order to enable a party to recover for injuries to his property, that he shall be entirely free from negligence himself; but if his negligence is slight, and that of the other party is gross, or if his is remote, and that of the other the proximate cause of the injury, he may recover. It is a question of fact for the jury to determine whether there has been negligence, and its nature and degree; but it is a question of law for the court to determine what degree of care and diligence on the one hand, and of negligence on the other, will entitle the plaintiff to recover.²

ILLUSTRATIONS.—A railroad train approached a highway crossing without giving the statutory signals. The plaintiff

R. R. Co. v. Dimick, 96 Ill. 42; *Chicago v. Stearns*, 105 Ill. 554; *Chicago etc. R. R. Co. v. O'Connor*, 13 Ill. App. 62; *Wabash etc. R. R. Co. v. Moran*, 13 Ill. App. 72; *Union etc. Co. v. Monaghan*, 13 Ill. App. 148; *Lake Shore etc. R. R. Co. v. O'Connor*, 115 Ill. 254; *Chicago etc. R. R. Co. v. Dillon*, 17 Ill. App. 355. In *Galena etc. R. R. Co. v. Jacobs*, where this doctrine was first announced, Mr. Justice Breeze, who delivered the opinion of the court, says, after a review of the American and English authorities on the subject: "It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties, for all care or negligence is at best but relative, — the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to

say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible running through very many of them, as where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*, 9 Car. & P. 613, and *Lynch v. Nurdin*, 1 Q. B. 29. We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."

¹ *Augusta etc. R. R. Co. v. McElmurry*, 24 Ga. 75.

² *Union Pacific R. R. Co. v. Rollins*, 5 Kan. 167; *Caulkins v. Matthews*, 5 Kan. 191; *Kansas Pacific R. R. Co. v. Pointer*, 14 Kan. 37; *Sawyer v. Sauer*, 10 Kan. 466.

approached the same point, driving a drove of cattle, and his son warned him that he thought he heard a train coming. The plaintiff, disregarding the warning, decided to attempt to rush the cattle across the track, and some of them were run over. *Held*, that he could not recover damages, because he and the defendant were in equal fault: *Ohio etc. R. R. Co. v. Eaves*, 42 Ill. 288. The plaintiff left his horse standing unattended in the street, and the employees of a telegraph company, in handling a broken wire, struck him, whereby he became frightened, ran away, and killed himself. *Held*, that the negligence of the plaintiff was so much greater than that of the defendant that he could not recover: *Western U. Tel. Co. v. Quinn*, 56 Ill. 319.

§ 1206. **Rule where Plaintiff a Law-breaker.** — The fact that the plaintiff is engaged in violating the law does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury.¹ Thus it has been held not to prevent a recovery by the plaintiff for the defendant's negligence that the former was doing the following acts contrary to statute, ordinance, or law, viz.: That the plaintiff stationed his horse and wagon transversely to the course of the street while loading furniture thereon;² that the plaintiff's horse was left standing in the street for more than five minutes without any person in charge, as required by the city ordinance;³ that the plaintiff was not standing as near to his horses as required by the city ordinance;⁴ that the plaintiff's vehicle was being driven on the wrong side of the road at the time of the collision;⁵ that the plaintiff and defendant were trotting their horses upon the highway for a purse of

¹ Thompson on Negligence, 1161; Spofford v. Harlow, 3 Allen, 176; Hall v. Ripley, 119 Mass. 135; Welch v. Wesson, 6 Gray, 305; Simmonson v. Stellenmerf, Edm. Sel. Cas. 194; Aston v. Heaven, 2 Esp. 533; Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 491; Churchill v. Rosebeck, 15 Conn. 359. *Contra*, Heland v. City of Lowell, 3 Allen, 407; 81 Am. Dec.

670. And see cases as to traveling on Sunday, Division II., Illegal Contracts, *ante*.

² Steele v. Burkhardt, 104 Mass. 59; 6 Am. Rep. 191.

³ Kearns v. Snowden, 104 Mass. 63, note.

⁴ Klipper v. Coffey, 44 Md. 117.

⁵ Spofford v. Harlow, 3 Allen, 176.

money, at which time the defendant willfully ran down the plaintiff's vehicle;¹ that the plaintiff was driving at an unlawful rate of speed;² that his harness had not the number of bells upon it required by statute;³ that he was driving faster than permitted by law;⁴ that he was smoking in the street in violation of a city ordinance;⁵ that he was working on Sunday, contrary to statute.⁶

¹ Welch v. Wesson, 6 Gray, 505.

² Hall v. Ripley, 119 Mass. 135; Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274.

³ Counter v. Cough, 8 Allen, 436.

⁴ Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274.

⁵ Baker v. Portland, 58 Me. 199; 4 Am. Rep. 274.

⁶ See *post*, Division III., Sunday. In Louisville etc. R. R. Co. v. Buck, 116 Ind. 566, the plaintiff was a brakeman on a train running on Sunday. The court say: "We had occasion to consider this question in Louisville etc. R. R. Co. v. Frawley, 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion there was, that a person injured by the negligent omission of another to perform a legal duty would not be denied a recovery, even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances in ignorance of their defective condition was the same on one day as on another. That they were being used on Sunday rather than on Monday neither contributed to nor was it the efficient cause of the injury which gave rise to this action, nor can the railroad company now interpose and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery: Sutton v. Wauwatosa, 29 Wis. 28. It is quite true that a plaintiff will in no case be permitted to recover when it is neces-

sary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law: Holt v. Green, 73 Pa. St. 198; Coppel v. Hall, 7 Wall. 558; Steele v. Burkhardt, 104 Mass. 59; McGrath v. Merwin, 112 Mass. 467. But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless: Cooley on Torts, 2d ed., 178, 179. Whoever travels about from place to place for the purpose of gaming, with cards or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was traveling in violation of the statute against gaming. Why should a brakeman who is required to work in violation of the Sunday law be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred were mere incidents to and were in no respect the foundation of the action: Louisville etc. R. R. Co. v. Frawley, 110 Ind. 18; Frost v. Plumb, 13 Am. Law Reg. 537."

ILLUSTRATIONS.—The defendant negligently drove his horses and wagon against and killed an ass which had been left in the highway fettered in the fore feet, and thus unable to get out of the way of the defendant's wagon, which was going at a "smartish pace" along the road. *Held*, that the jury were properly directed that, although it was an illegal act on the part of plaintiff so to put the animal on the highway, the plaintiff was entitled to recover: *Davies v. Mann*, 10 Mees. & W. 545.

§ 1207. **Where Plaintiff a Trespasser.**—Thus though a person owes no duty to a trespasser on his premises,¹ yet he is liable if he wantonly or willfully injures him.²

§ 1208. **Contributory Negligence of Children and Persons non Sui Juris.**—Where a child is so young as to be incapable of discerning danger or taking care of itself, it cannot be guilty of contributory negligence.³ "The doctrine of contributory negligence does not apply to an infant of tender years. To disentitle the plaintiff to recover, it must be shown that the injury was occasioned entirely by his own negligence."⁴ The capability of an infant under fourteen to avoid danger is measured in the same way as the capacity of such a person when charged with crime.⁵ In the absence of clear proof to the contrary, an infant of the age of fourteen years will be presumed to have sufficient capacity to recognize and

¹ See *ante*, Injuries on Real Property.

² *Brown v. Lynn*, 31 Pa. St. 510; 72 Am. Dec. 768; *Marble v. Ross*, 124 Mass. 44.

³ *Gardner v. Grace*, 1 Fost. & F. 359; *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *O'Mara v. R. R. Co.*, 38 N. Y. 445; 98 Am. Dec. 61; *Daley v. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455; *Walters v. R. R. Co.*, 41 Iowa, 71; *Schmidt v. R. R. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70; *Chicago etc. R. R.*

Co. v. Gregory, 58 Ill. 226; *East Tennessee etc. R. R. Co. v. St. John*, 5 Sneed, 524; 73 Am. Dec. 149; *Bayshore R. R. Co. v. Hanes*, 67 Ala. 6; *Frick v. R. R. Co.*, 75 Mo. 595. A boy six years old struck by a train is not chargeable with contributory negligence: *Central Trust Co. v. R. R. Co.*, 31 Fed. Rep. 246. A parent's admission that he had warned an infant to avoid a certain danger cannot be used against a son on the trial of his action for an injury: *Power v. Harlow*, 57 Mich. 107.

⁴ *Gardner v. Grace*, 1 Fost. & F. 359.

⁵ *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308.

avoid danger.¹ While an inexperienced youth is chargeable with less care and foresight than a man, yet if the youth is aware of the danger, his negligence will defeat his recovery for an injury to which it directly contributed.² Where a child at the time of an injury to it was *sui juris* capable of caring for its safety, it is incumbent upon it to exercise vigilance for its protection, but only such as can reasonably be expected of a child of its maturity and capacity.³ So where infants are the actors, that will be considered an unavoidable accident which would not be so considered where the actors are adults.⁴ Therefore a child playing on or near a railroad track, exercising all the care that it is capable of, may recover for injuries caused by the negligence of the railroad company.⁵ In the following cases children have been held guilty of contributory negligence, viz.: A boy about nine years old riding on the runners of sleighs in the streets suddenly leaving such a sleigh in motion without looking behind him, within thirty feet of a following horse, and so struck and injured;⁶ a girl of nine who had been warned of the danger, but climbed from a window to a painter's scaffold, fell to the ground, and was injured;⁷ a boy over fifteen years of age walking on a railroad track, instead of the road near by, and seeing the

¹ Nagle v. R. R. Co., 88 Pa. St. 35; 32 Am. Rep. 413.

² Dowling v. Allen, 88 Mo. 293.

³ Lynch v. Nurdin, 1 Q. B. 29; 4 Perry & D. 672; Washington etc. R. R. Co. v. Gladmon, 15 Wall. 401; Sioux City etc. R. R. Co. v. Stout, 17 Wall. 657; Baltimore etc. R. R. Co. v. Fryer, 30 Md. 47; State v. R. R. Co., 24 Md. 84; 87 Am. Dec. 600; Baltimore etc. R. R. Co. v. McDonnell, 43 Md. 534; McMahon v. R. R. Co., 39 Md. 438; Smith v. O'Connor, 48 Pa. St. 218; 86 Am. Dec. 582; O'Flaherty v. R. R. Co., 45 Mo. 70; 100 Am. Dec. 343; Donoho v. Vulcan Iron Works, 7 Mo. App. 447; Byrne v. R. R. Co., 83 N. Y. 620.

⁴ Bullock v. Babcock, 3 Wend. 391,

394; Cosgrove v. Ogden, 49 N. Y. 255; 10 Am. Rep. 361.

⁵ Daley v. R. R. Co., 26 Conn. 591; 68 Am. Dec. 413; Hicks v. R. R. Co., 64 Mo. 430; Chicago etc. R. R. Co. v. Murray, 71 Ill. 601; Washington etc. R. R. Co. v. Gladmon, 15 Wall. 401; Chicago etc. R. R. Co. v. Dewey, 26 Ill. 259; 79 Am. Dec. 374, per Walker J.; Pittsburgh etc. R. R. Co. v. Bumstead, 48 Ill. 221; 95 Am. Dec. 539; Pennsylvania R. R. Co. v. Morgan, 82 Pa. St. 134; Kay v. R. R. Co., 65 Pa. St. 269; 3 Am. Rep. 628; Norfolk etc. R. R. Co. v. Ormsby, 27 Gratt. 455; Manly v. R. R. Co., 74 N. C. 655.

⁶ Messenger v. Dennie, 137 Mass. 197; 50 Am. Rep. 295.

⁷ Martin v. Cahill, 39 Hun, 445.

train approaching for nearly a quarter of a mile, but waiting until it was very near, and then stepping to one side, but only a little way, and there, while looking at the wheels, being struck by a plank projecting from a car.¹ Greater care is required of railroads and others towards infants and other persons *non sui juris* than towards adults.²

ILLUSTRATIONS. — A boy thirteen years of age struck a dog, which thereupon bit him. *Held*, that an action for such injury was maintainable, although the boy was old enough to know that the striking would be apt to incite the dog to bite him, provided the boy acted with such care as would be due care in a boy of his years: *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645. A boy was warned off a gangway, because it was a passage for laborers to pass through with iron trucks, wheelbarrows, etc. He was subsequently in the gangway, when he was killed by the falling of a car negligently pushed off a tramway overhead. *Held*, that he was not guilty of contributory negligence, there being no reason to expect danger from the cars above: *Gray v. Scott*, 66 Pa. St. 345; 5 Am. Rep. 371.

§ 1209. **Injury to Trespassing Children.** — The general rule is, that one is not liable for an injury received by a child who is at the time a trespasser,³ though, as has been already stated, the law requires special efforts on the

¹ *Central R. R. Co. v. Brinson*, 70 Ga. 207.

² *O'Mara v. R. R. Co.*, 38 N. Y. 445; 98 Am. Dec. 61; *Washington etc. R. R. Co. v. Gladmon*, 15 Wall. 401; *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Walters v. R. R. Co.*, 41 Iowa, 71; *East Tennessee R. R. Co. v. St. John*, 5 Sneed, 524; 73 Am. Dec. 149; *Hund v. Geier*, 72 Ill. 394; *Kerr v. Fergie*, 54 Ill. 482; 5 Am. Rep. 146; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago etc. R. R. Co. v. McKean*, 40 Ill. 218; *Illinois Central R. R. Co. v. Buckner*, 28 Ill. 299; 81 Am. Dec. 282; *East Saginaw R. R. Co. v. Bohn*, 27 Mich. 503; *Kenyon v. R. R. Co.*, 5 Hun, 479; *Pittsburgh R. R. Co. v. Caldwell*, 72 Pa. St. 421; *Brennan v. R. R. Co.*, 45 Conn. 284; 29 Am. Rep. 679; *R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175.

³ *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. St. 321; *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284; 59 Am. Rep. 16; *Atchison etc. R. R. Co. v. Flinn*, 24 Kan. 627; *Emerson v. Peteler*, 35 Minn. 481; 59 Am. Rep. 337; *Miles v. R. R. Co.*, 4 Hughes, 172; *Wendell v. R. R. Co.*, 91 N. Y. 420; *Klix v. Nieman*, 68 Wis. 271; 60 Am. Rep. 854; *Fay v. Kent*, 55 Vt. 557; *Galligan v. Metacomet Manufacturing Co.*, 143 Mass. 527; *Chicago etc. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Central Branch R. R. Co. v. Henigh*, 23 Kan. 347; 33 Am. Dec. 167; *Ex parte Stell*, 4 Hughes, 157. But a very young child cannot be a trespasser: *Keyser v. R. R. Co.*, 56 Mich. 559; *Frick v. R. R. Co.*, 5 Mo. App. 435; *Texas etc. R. R. Co. v. O'Donnell*, 58 Tex. 27.

part of the defendant to prevent an injury, after it is discovered.¹ But a person is liable for an injury to a child trespassing upon his premises, where he would not be in the case of an adult. "In the case of young children," says Judge Cooley,² "and other persons not fully *sui juris*, an implied license might sometimes arise when it would not in behalf of others. Thus leaving a tempting thing for children to play with exposed where they would be likely to gather for that purpose may be equivalent to an invitation to them to make use of it; and perhaps if one were to throw away upon his premises near the common way things tempting to children, the same implication should arise." Thus an exception to the rule laid down in a previous section exists in the case of injuries to children, although they may have been trespassing at the time. Here, where it appears that from the position of the dangerous object or defect it would be likely to attract and cause injury to children, the owner will be held liable.³ This principle applies in the case of machinery left so near the highway as to attract passing children, who, not interfered with, proceed to meddle with it and injure themselves.⁴

In like manner owners of cars left standing on a public street crossing are liable for injury caused thereby to a child of tender years who attempts to pass under them.⁵ So persons who carry on a dangerous work, like excavating sand, in a neighborhood where there are many

¹ *Schwieger v. R. R. Co.*, 90 N. Y. 558; *Little Rock R. R. Co. v. Barker*, 39 Ark. 491; *Burnett v. R. R. Co.*, 16 Neb. 332.

² Cooley on Torts, 303.

³ *Lynch v. Nurdin*, L. R. 1 Q. B. 29; *Hydraulic Works v. Orr*, 83 Pa. St. 332. *Contra*, *Hughes v. Macfie*, 2 Hurl. & C. 744; *Mangan v. Atterton*, L. R. 1 Ex. 239.

⁴ *Whirley v. Whiteman*, 1 Head, 610; *Mullaney v. Spence*, 15 Abb. Pr., N. S., 319; *Porter v. Brewing Co.*, 24 Mo. App. 1; *Boland v. R. R. Co.*, 36

Mo. 484, the court saying: "If, therefore, any one using dangerous instruments, running machinery, or employing vehicles which are peculiarly hazardous, and he know that infants, idiots, or others who are bereft of or have but imperfect discretion are in close or immediate proximity, he will be compelled to the exercise of a degree of caution, skill, and diligence which would not be required in case of other persons."

⁵ *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747.

small children, are bound to take measures to keep them away from it.¹ It has been held in several cases in this country that a child of tender years sustaining an injury while playing on a railroad turn-table left unlocked and unguarded may maintain an action therefor, even though he is a trespasser at the time, it being on the company's premises.² But in all these cases the turn-table was either on the public way or near it, or in a part of the company's premises open to strangers, or so near thereto as to attract the attention of passing children. Following this principle, therefore, in another case, it was held that the railroad company was not liable where the turn-table, though unlocked and unguarded, was constructed in an isolated place not near any public street or place where the public were in the habit of passing.³ In a New York case a landlord, as required by statute, had erected a fire-escape upon a tenement-house which he owned. The child of a tenant in one of the rooms got out of the window, and walking along it, fell through a trap-door at the end, which led to a ladder, and was killed. It was held that the owner was not liable.⁴ If, from some unexplained cause, a pile

¹ *Fink v. Furnace Co.*, 10 Mo. App. 61.

² *Evansich v. R. R. Co.*, 57 Tex. 126; 44 Am. Rep. 586; *Nagel v. R. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Kansas Central R. R. Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203; *Keffe v. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Sioux City etc. R. R. Co. v. Stout*, 17 Wall. 657; *Koons v. R. R. Co.*, 65 Mo. 592.

³ *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269.

⁴ *McAlpin v. Powell*, 70 N. Y. 131; 26 Am. Rep. 555. "The deceased clearly had no right to go upon the platform, and was there for no legitimate purpose. It was not intended for any such use, and the act of the deceased in entering upon and passing along the platform was in violation of the purpose for which it was designed. It was put up only for a fire-escape, to be used for the protection of life in

case of danger from fires, and was not intended and was never used as a balcony. The proof showed that children were not accustomed to go there, and it was only accessible by passing out of the window. Nor does it appear from the evidence, although it was protected in part by an iron railing, that it was intended to be guarded in a manner sufficient to prevent accident to very young children arising from such an exposed position. It bore no indication that it was designed for general use, and furnished no invitation or attraction to young children any more than the roof of a stoop or piazza which projects under the window of a dwelling-house, and is easy of access to persons in the vicinity. Under such a state of facts, and where a person thus voluntarily exposes himself to danger and is injured, there is no rule of law which authorizes a recovery."

of lumber falls upon a child while trespassing upon the premises of the defendants, who had given their watchman orders to exclude children, which was generally done, no liability will attach.¹ But piling lumber upon and near the sidewalk of a public street, in such a manner as to be dangerous to children, is an act for which the employers of the person so doing are responsible, though done contrary to their orders.² It is not negligence to fail to guard against an unexpected and thoughtless act of a child.³

ILLUSTRATIONS. — Defendant's servant left his horse and cart unattended in a populous street. The plaintiff, a child seven years old, got upon the car, in play; another child made the horse move on while the plaintiff was in the act of getting down from it, in consequence of which the plaintiff was thrown down and had his leg broken. *Held*, that the defendant was liable although the plaintiff was a trespasser: *Lynch v. Nurdin*, 1 Q. B. 29.⁴ A railroad turn-table is situated near a popu-

¹ *Vanderbeck v. Hendry*, 34 N. J. L. 467.

² *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361; *Bransom v. Labrot*, 81 Ky. 638; 50 Am. Rep. 193.

³ *Gallaher v. R. R. Co.*, 37 La. Ann. 288.

⁴ Lord Denman, C. J., saying: "Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant, which pro-

duced it." But the rule in this case, though in accord with the weight of authority in the United States, conflicts with other cases in the English reports. Thus in *Mangan v. Atterton*, L. R. 1 Ex. 239, 4 Hurl. & C. 388, determined in 1866 in the English court of exchequer, the defendant exposed in a public place, for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. A boy four years old, by direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed. It was held that no action lay for the injury; *Bramwell, B.*, saying: "The defendant is no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tort-feasor?" So in *Hughes*

lous city, in an open prairie, where the cattle of citizens roam and graze, where persons frequently pass and repass, and where boys often play. It is left without locks or fastenings, and without being watched or guarded, or even fenced in. A boy, hunting his father's cows, goes to the turn-table with other boys, and rides and plays upon it, and is injured by means thereof. *Held*, that the boy is not guilty of contributory negligence, and the railroad is liable: *Kansas Central R. R. Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203. Defendant owned, and kept for the purpose of turning its engines, a turn-table, which was built within forty rods of its depot building in a small town. It was left unlocked and unguarded, and children were in the habit of playing upon it. While so playing with other children, the plaintiff's foot was caught between the end of the rails and crushed. *Held*, that he was entitled to recover damages: *Keffe v. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393. The proprietors of a paper-mill propelled by steam, in a sparsely settled portion of a city, left two cog-wheels geared to-

v. Macfie, 2 Hurl. & C. 744, where Pollock, C. B., delivered the opinion of the court, as follows: "It appeared there was a public street in Liverpool, over the whole of which, from fence to fence, the public had a right of way, subject to the existence of certain cellars. On one side of the street was a foot-path; on the other side no foot-path, but the cellars alluded to, which made that side less commodious as a way. Still, the public had the right to pass there. The defendant, who was the occupier of a house and cellar on this latter side, took off the flap or cover of his cellar and placed it against the wall on the same side, nearly upright, so that it could easily be pulled over. It may be admitted that if a person, in passing along the street, had, without carelessness (as, for example, by his dress being blown against it), pulled the flap over, and been hurt thereby, he might have maintained an action against the defendants for the negligence or wrong in placing the flap so that, without any negligence in the plaintiff, it was likely to do, and had done, damage to him. In the case in which Hughes was the plaintiff, the flap was pulled over by the plaintiff, a child of tender years [seven], by playing on it and jumping from it, when it fell upon him and hurt him severely. Had he been an adult, it is clear he could

have maintained no action. He would voluntarily have meddled, for no lawful purpose, with that which, if left alone, would not have hurt him. He would therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference. His touching the flap was for no lawful purpose; and if he could maintain the action, he could equally do so if the flap had been placed inside the defendant's premises, within sight and reach of the child. As far as the child's act is concerned, he had no more right to touch this flap for the purpose of which he did touch it than he would have had if it had been inside the defendant's premises. Cases were referred to, supposed to be in favor of the plaintiff. We think none are decisive of this case, and no case establishes a principle opposed to our view, which is that the nonsuit was right. As to the other action, in which Abbott was plaintiff, the case is different. If he was playing with Hughes, so as to be a joint actor with him, he cannot maintain this action. If not, we think he can, as his injuries would then be the result of the joint negligence of Hughes and the defendants. How this is does not appear; and we think as to his case there ought to be a new trial."

gether outside the wall, twenty inches from the ground, and twenty feet from the street, exposed, unprotected, and constantly in motion. A boy three years of age, playing near this gearing, was caught in it and his leg taken off. Eighteen years afterwards, on coming of age, he brought an action for the damages. The jury found for the defendants. *Held*, that the verdict was against the evidence: *Whurley v. Whiteman*, 1 Head, 610. The owner of a coal-yard had an elevator worked by steam close to the sidewalk. During an intermission of work, the sliding door by which it was commonly shut off from the street was left open and unguarded, in consequence of which a child got under it and was crushed by the descending car. *Held*, that the question of the defendant's negligence was for a jury: *Mulaney v. Spence*, 15 Abb. Pr., N. S., 319. A railroad company had a turn-table, used for the purpose of turning locomotives, situated near two traveled roads, in a hamlet of about one hundred and fifty people. The latch by which it was fastened was broken, and children could easily turn it around. Three small boys went to it to play; and while two of them were turning it around, the foot of the third one was caught between a rail of the turn-table and a rail of the connecting railroad track, and was crushed. *Held*, that whether there was negligence on the part of the railway company was properly left to the jury: *Sioux City etc. R. R. Co. v. Stout*, 17 Wall. 657. Adjoining a factory was a private alley, which communicated with a public street by a gate which was frequently left opened by employees, though contrary to orders. In this alley, twenty-four feet from the street, was a platform to be raised and lowered in receiving and shipping goods. This platform, when raised, rested against the wall, and was held up only by its own slight inclination, having no fastening. A child six years old, playing in the street, strayed into the alley, and was killed by the fall of the platform. *Held*, that the lessees of the factory were liable: *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. The defendant set up a gate on his own land, by the side of a lane through which the plaintiff, a child between six and seven years of age, with other children of the same neighborhood, were accustomed to pass from their places of residence to the highway. The plaintiff, in passing along this lane, put his hands on the gate and shook it, in consequence of which it fell upon him and broke his leg. *Held*, that the defendant was liable: *Birge v. Gardiner*, 19 Conn. 507; 50 Am. Dec. 261. An action was brought for an injury to a boy twelve years of age, occasioned by the negligence of the defendant in placing upon the sidewalk a number of barrels and counters in a tottering condition, and allowing them to remain so for several weeks. The plaintiff, in passing this rubbish, on his way home from his work to dinner, put his

hands upon a counter, apparently making a motion to jump upon it, when it fell upon him, fracturing his leg. *Held*, that he was entitled to recover: *Kerr v. Forgue*, 54 Ill. 282; 5 Am. Rep. 146. A child called to L., another child seven years old, to come across the street and see him move the tongue of a truck loaded with iron, and carelessly left by the owners standing in the street. As L. approached, the iron fell on him and injured him. In an action by L. to recover from the owner, *held*, that an instruction that if L. was in the exercise of due care, and went, attracted by curiosity only, and not as a joint actor to encourage the meddler, he could recover, was proper: *Lane v. Atlantic Works*, 111 Mass. 136; 107 Mass. 104. A person who had contracted with a school district for drilling a well in the school-house grounds, left his drilling-machine unlocked and unguarded, and in his absence, one of the school children was injured while playing with it. *Held*, that the district was not liable: *Wood v. Independent School District*, 44 Iowa, 27.¹ Defendant owned an abandoned and uninclosed brick-yard, with an open and unguarded, but plainly visible, well in it, about eighty feet from the nearest highway. The public were accustomed to cross the yard, but the paths were somewhat distant from the well. The nearest dwelling-house was three hundred yards distant. The lot was a common place of resort of children and adults. A boy eight years old was found drowned in the well, having evidently been fishing in it by daylight. *Held*, that no action would lie: *Gillespie v. McGowen*, 100 Pa. St. 144; 45 Am. Rep. 365.²

¹ The court saying: "We are not prepared to hold that every person having upon his premises machinery, tools, or implements which would be dangerous playthings for children, and in their nature affording special temptations to children to play with them, is under obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on the premises."

² The court saying: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or dead-fall as in *Hydraulic Co. v. Orr*. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this

respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brick-yards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it or fill up their ponds and level the surface so that trespassers may not be injured would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is

§ 1210. Imputed Negligence of Parents or Guardians.

—In the leading case of *Hartfield v. Roper*,¹ decided by the supreme court of New York in 1839, an action was brought for a negligent injury to a child two years of age, who was run over while at play in a public street. The court held that where a child of such tender age as not to possess sufficient discretion to avoid danger is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveler and injured, neither trespass nor case lies against the traveler, unless the injury was voluntary, or arose from "gross" negligence on his part. In an action for such injury, if there was negligence on the part of the plaintiff contributing to the injury, there cannot be a recovery; and although the child, by reason of his tender age, was incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult.² This doctrine has been followed in a number

tempting fruit; yet I never heard that it was the duty of the owner of a fruit-tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

¹ 21 Wend. 615; 34 Am. Dec. 273.

² Followed in New York in later cases: *Ihl v. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Morrison v. R. R. Co.*, 56 N. Y. 305; *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66, the court saying: "This rule applies to infants, in their relations to society, who are of such tender age that they are incapable of self-control and personal protection. An infant in its first years is not *sui juris*. It belongs to

another, to whom discretion in the care of its person is exclusively confided. The custody of the infant of tender years is confided by law to its parents, or those standing *in loco parentis*; and not having that discretion necessary for personal protection, the parent is held, in law, to exercise it for him, and in cases of personal injuries received from the negligence of others, the law imputes to the infant the negligence of the parents. The infant being *non sui juris*, and having a keeper, in law, to whose discretion in the care of his person he is confided, his acts, as regards third persons, must be held, in law, the acts of the infant, his negligence, the negligence of the infant." But see *Thurston v. R. R. Co.*, 60 N. Y. 333, and *McGarry v. Loomis*, 63 N. Y. 104, which considerably weaken the authority of the earlier cases.

of states.¹ But in some of these states the doctrine, though professedly followed, is much modified. Thus in Maryland it is held that a child *non sui juris* will not be prevented from recovering in consequence of the negligence of his parents, if the jury shall find that the consequences of such negligence could have been avoided by the exercise of ordinary care and prudence on the part of the defendant.² In Illinois, under the doctrine of comparative negligence, which prevails in that state, the child may recover damages, provided the parent's negligence was slight, and the defendant's gross in comparison.³

¹ *California*. — *Karr v. Parks*, 40 Cal. 188; *Schierhold v. R. R. Co.*, 40 Cal. 447; *Meeks v. R. R. Co.*, 52 Cal. 602.

Illinois. — *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago v. Starr's Admr.*, 42 Ill. 174; 89 Am. Dec. 423; *Chicago etc. R. R. Co. v. Becker*, 76 Ill. 25; 84 Ill. 482; *Chicago v. Hesing*, 83 Ill. 204; 25 Am. Rep. 378; *Toledo etc. R. R. Co. v. Grable*, 88 Ill. 441.

Indiana. — *Evansville etc. R. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 545; 49 Ind. 154; *Pittsburgh etc. R. R. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Hathaway v. R. R. Co.*, 46 Ind. 25.

Kentucky. — *Louisville etc. Canal Co. v. Murphy*, 9 Bush, 522.

Maine. — *Brown v. R. R. Co.*, 58 Me. 384.

Maryland. — *McMahon v. R. R. Co.*, 39 Md. 439; *Baltimore etc. R. R. Co. v. McDonnell*, 43 Md. 551.

Massachusetts. — *Wright v. R. R. Co.*, 4 Allen, 283; *Holly v. Boston Gas Co.*, 8 Gray, 123; 59 Am. Dec. 233; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 53; 6 Am. Rep. 188; *Callahan v. Bean*, 9 Allen, 401; *Lovett v. R. R. Co.*, 9 Allen, 557.

Missouri. — *Isabel v. R. R. Co.*, 60 Mo. 475; *Boland v. R. R. Co.*, 36 Mo. 484. But see *Stillson v. R. R. Co.*, 67 Mo. 671.

Nebraska. — *Meyer v. R. R. Co.*, 2 Neb. 319.

Wisconsin. — *Ewen v. R. R. Co.*, 38 Wis. 613.

² *McMahon v. R. R. Co.*, 39 Md. 438; *Baltimore etc. R. R. Co. v. McDonnell*, 43 Md. 535.

³ *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago v. Hesing*, 83 Ill. 204; 25 Am. Rep. 378; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *Pittsburg etc. R. R. Co. v. Bumstead*, 48 Ill. 221; 95 Am. Dec. 539; *Chicago etc. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Ohio etc. R. R. Co. v. Stratton*, 78 Ill. 88; *Chicago etc. R. R. Co. v. Becker*, 84 Ill. 483. In *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422, where a child of six was killed in the street, it was said: "That it was carelessness of no slight degree to permit this child of six years thus to wander over the streets of a crowded city is a proposition that admits neither of debate nor doubt. . . . We are of opinion that the negligence on the part of the city was not only not more, but was even less, than that fairly attributable to the parents of the child." In *Toledo etc. Co. v. Grable*, 88 Ill. 442, a child twenty-eight months old wandered on the track and was run over, and the mother was killed in trying to save the child. The court said: "Where there is negligence on the part of the injured party, or, as in this case, on the part of those charged with the care of the injured party, contributing directly to produce the result, there can be no recovery, unless such negligence is slight, and that of the defendant gross in the comparison."

On the other hand, in a number of states, the doctrine is denied, and it is held that the failure of the parent to exercise proper care over the child, such as that it shall be restrained within safe limits, cannot affect the child's right of action for injuries sustained through the negligence of third persons.¹

¹ *Alabama*. — *Government etc. R. R. Co. v. Hanlon*, 53 Ala. 70; *Pratt Coal Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751.

Connecticut. — *Birge v. Gardiner*, 19 Conn. 507; 50 Am. Dec. 261. In *Daley v. R. R. Co.*, 26 Conn. 591, 68 Am. Dec. 413, a child three years old was run over in the city of Norwich by a freight train drawn by powerful engines, and making from five to fifteen miles per hour, around a curve, where the engineer could not see forty paces ahead. The trial court said: "In an action brought by the father, his negligence might be a defense, but in an action by a child for an injury inflicted on her through the defendant's negligence, if such negligence is proved against them, they are not relieved from the consequences of their own fault because the natural protectors of the plaintiff may also have been wanting in their duty towards her." On appeal, the supreme court say: "We entertain no doubt that the view expressed by the judge is entirely correct. . . . It is obvious that the negligence of the parents, if there was any, is not the want of ordinary care in a child less than three years of age, however much such negligence might be a defense to an action by the father, had he sued the company for expenses incurred, or for loss of service."

Iowa. — In *Walters v. R. R. Co.* 41 Iowa, 71, a child two years old was run over in Davenport by a freight train. The person in charge of the child was claimed to have been negligent in permitting the child to get upon the track. Day, J., speaking for the supreme court, and holding that a child of two cannot be deemed guilty of negligence, says: "When, therefore, the parents, who are primarily intrusted with the protection and care of their infant children, and who are entitled to the pecuniary com-

pensation which the law allows for a wrongful act resulting in their death, exercise reasonable and ordinary care, the public interests are subserved, there is no good reason why the negligence of the person in charge of the child should be imputed to the parent, and through the parent to the child itself."

Ohio. — *Bellefontaine R. R. Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175. Where a girl of six was run over by a gravel train, the court say: "We have examined most of the authorities with some care, and the result is a conviction that in most of the cases the assertion of the doctrine amounts to little more than mere dicta. . . . The cases warrant the declaration of no such general rule. . . . The utmost that can fairly be claimed from the authorities is, that the rule is applicable to some cases, to be determined by the nature of the negligence of defendant. . . . The weight of authority, in our judgment, as well as the reasoning, is against the adoption of the doctrine in any form or under any circumstances." In *Cleveland etc. R. R. Co. v. Manson*, 30 Ohio St. 451, where the plaintiff was a girl of nine, that court follows Snyder's case, and declares that the doctrine of imputed negligence does not prevail in Ohio. In *St. Clair R. R. Co. v. Eadie*, 43 Ohio St. 91, 54 Am. Rep. 144, a female of sixteen was injured by the collision with a street-car of a wagon in which she was riding with her father, he driving, through the mutual and concurring negligence of the father and the driver of the street-car. The court hold the plaintiff not responsible for her father's negligence.

Minnesota. — *St. Paul v. Kirby*, 8 Minn. 154; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; *Fitzgerald v. R. R. Co.*, 29 Minn. 376.

But even in those states where the doctrine of imputed negligence is not held to, the parent, when bringing an action in his own name, for injury to himself, cannot recover if he has been guilty of contributory negligence.¹

At what age a child may properly be allowed to go on the public streets unattended becomes a question of great importance in suits for injuries to young children, where the doctrine of the imputed negligence of their parents or guardians is invoked. There are a number of cases in the reports in which it has been ruled that, as a matter of law, children between the ages of one and a half and seven years were not *sui juris*.² In other cases, children

Nebraska. — *Huff v. Ames*, 16 Neb. 137; 49 Am. Rep. 716.

Pennsylvania. — *Smith v. O'Connor*, 48 Pa. St. 218; 86 Am. Dec. 582; *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372; *Rauch v. Lloyd*, 31 Pa. St. 358; 72 Am. Dec. 747; *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257; *Glassey v. R. R. Co.*, 57 Pa. St. 172; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 544; *Oakland R. R. Co. v. Fielding*, 48 Pa. St. 320; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Erie R. R. Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471.

Tennessee. — *Whirley v. Whiteman*, 1 Head, 610; *East Tennessee R. R. Co. v. St. John*, 5 Sneed, 524; 73 Am. Dec. 524.

Texas. — *Galveston etc. R. R. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265.

Vermont. — *Robinson v. Cone*, 22 Vt. 213; 54 Am. Dec. 67.

Virginia. — *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt, 455.

United States. — In *Stout v. R. R. Co.*, 2 Dill. 298, 11 Am. Law Reg. 236, 17 Wall. 657, a boy of six was injured on defendant's turn-table. Dundy, J., charged the jury against the doctrine of imputed negligence of father to child. The jury failing to agree, on a second trial, Dillon, J., charged the jury, stating to them that the counsel for the defendant "disclaim, resting

their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff, considering his tender age, was negligent."

¹ *Bellefontaine R. R. Co. v. Snyder*, 24 Ohio St. 670; *Isabel v. R. R. Co.*, 60 Mo. 475; *Walters v. R. R. Co.*, 41 Iowa, 71; *Albertson v. R. R. Co.*, 48 Iowa, 292; *Koons v. R. R. Co.*, 65 Mo. 592; *O'Flaherty v. R. R. Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Glassey v. R. R. Co.*, 57 Pa. St. 172; *Pittsburgh etc. R. R. Co. v. Pearson*, 72 Pa. St. 169; *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257; *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; 37 Pa. St. 420; *Birmingham v. Dorer*, 3 Brewst. 69; *Daley v. R. R. Co.*, 26 Conn. 591, 598; 68 Am. Dec. 413; *Bakimore etc. R. R. Co. v. Fryer*, 30 Md. 47; *Williams v. R. R. Co.*, 60 Tex. 205; *Pennsylvania R. R. Co. v. James*, 81½ Pa. St. 194; *Pratt Coal Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751. In *Cauley v. R. R. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664, the court say: "The rule is well settled, and is sustained by reason and authority. Moreover, it is demanded by humanity. There are many unfeeling parents, who not only neglect but maltreat their children. It would be cruel to such children to lay down a rule which would make it an object for unprincipled parents to expose them to injury and death upon a railroad track."

² *Schmidt v. R. R. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Mangam v. R. R.*

of eleven, twelve, thirteen, and fourteen have been held not incapable of taking care of themselves.¹ But where there is any doubt as to the child being of sufficient age, the question should be submitted to a jury.² This has been done in the case of a child between six and seven years old,³ ten years,⁴ eight years,⁵ nearly seven years,⁶ six years,⁷ five and one half years,⁸ five years,⁹ and four years and seven months.¹⁰ So it has been held a question for the jury whether it is negligence to send out a child two years and eight months old under the care of another eight years of age;¹¹ one three and one half years old in company with another nine years of age;¹² one a little over three years in company with another between nine and ten;¹³ one four years and five months old in company with another of twelve years and six months;¹⁴ and one six years of age in company with another of ten;¹⁵ a boy

Co., 38 N. Y. 455; 36 Barb. 230; 98 Am. Dec. 66; *Kreig v. Wells*, 1 E. D. Smith, 76; *Meeks v. R. R. Co.*, 52 Cal. 602; *Lehman v. R. R. Co.*, 29 Barb. 234; *McLain v. Van Zandt*, 7 Jones & S. 347; *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273; *Pittsburgh etc. R. R. Co. v. Vining*, 27 Ind. 513; *Chicago v. Starr*, 42 Ill. 174; *O'Flaherty v. R. R. Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Mascheck v. R. R. Co.*, 3 Mo. App. 600; *Toledo etc. R. R. Co. v. Grable*, 88 Ill. 441; *Wright v. R. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Evansville etc. R. R. Co. v. Wolf*, 59 Ind. 89; *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287; 92 Am. Dec. 318; *Jeffersonville etc. R. R. Co. v. Bowen*, 40 Ind. 545; 49 Ind. 154; *McGarry v. Loomis*, 63 N. Y. 104; 20 Am. Rep. 510; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Pittsburgh etc. R. R. Co. v. Caldwell*, 74 Pa. St. 421.

¹ *McMahon v. R. R. Co.*, 33 N. Y. 642; *Downs v. R. R. Co.*, 47 N. Y. 83; *Achtenhagen v. Watertown*, 18 Wis. 331; 86 Am. Dec. 769; *O'Mara v. R. R. Co.*, 38 N. Y. 445; 98 Am. Dec. 61; *Nagle v. R. R. Co.*, 88 Pa. St. 35;

32 Am. Rep. 413; *Stafford v. Robbers*, 115 Ill. 196; *Parrish v. Eden*, 62 Wis. 272.

² 2 Thompson on Negligence, 1182.

³ *Honegsberger v. R. R. Co.*, 1 Keyes, 570; 33 How. Pr. 195; 2 Abb. App. 378.

⁴ *Lovett v. R. R. Co.*, 9 Allen, 557; *Karr v. Parks*, 40 Cal. 188.

⁵ *Drew v. R. R. Co.*, 26 N. Y. 49.

⁶ *Oldfield v. R. R. Co.*, 14 N. Y. 310; 3 E. D. Smith, 103.

⁷ *Cosgrove v. Odgen*, 49 N. Y. 255; 10 Am. Rep. 361.

⁸ *Barksdull v. R. R. Co.*, 23 La. Ann. 180.

⁹ *Karr v. Parks*, 40 Cal. 188.

¹⁰ *Lynch v. Smith*, 104 Mass. 53; 6 Am. Rep. 188; *St. Paul v. Kuby*, 8 Minn. 154.

¹¹ *O'Flaherty v. R. R. Co.*, 45 Mo. 70; 100 Am. Dec. 343.

¹² *Mulligan v. Curtis*, 100 Mass. 512; 97 Am. Dec. 121.

¹³ *Ihl v. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450.

¹⁴ *East Saginaw City R. R. Co. v. Bohn*, 27 Mich. 503.

¹⁵ *Chicago etc. R. R. Co. v. Becker*, 76 Ill. 25; 84 Ill. 483.

of four in charge of a sister of eleven;¹ a child of two in the care of a brother of eight.²

Where the child has escaped from the control of the parent, it is a question for the jury whether the means employed for restraining the child were reasonably sufficient.³ The condition in life and means of the parent are relevant, upon the degree of care which the law will demand of him under the circumstances.⁴ The degree of care which parents are bound to take to prevent the escape of their children from their immediate supervision may depend upon the condition and resources of the parents.⁵

¹ *Collins v. R. R. Co.*, 142 Mass. 301; 56 Am. Rep. 675.

² *Bliss v. South Hadley*, 145 Mass. 91; 1 Am. St. Rep. 441.

³ *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *Fallon v. R. R. Co.*, 64 N. Y. 13; *Prendegast v. R. R. Co.*, 58 N. Y. 652; *Bahrenburgh v. R. R. Co.*, 56 N. Y. 652; *Pittsburgh etc. R. R. Co. v. Bumstead*, 48 Ill. 221; 95 Am. Dec. 539; *Pittsburgh etc. R. R. Co. v. Pearson*, 72 Pa. St. 169.

⁴ *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago v. Hesing*, 83 Ill. 204; 25 Am. Rep. 378. A mother who leaves a child four years of age with his sister fourteen years of age, who is shown to be intelligent and affectionate, while the mother visits a neighbor, is not guilty of contributory negligence: *Pittsburgh etc. R. R. Co. v. Bumstead*, 48 Ill. 221; 95 Am. Dec. 539.

⁵ *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257; *Walters v. R. R. Co.*, 41 Iowa, 71; *Pittsburgh etc. R. R. Co. v. Pearson*, 72 Pa. St. 169. But in *Hagan's Case*, 5 Dill. 96, *Dillon, J.*, said: "This distinction may be doubted; for there is not, in this country, one rule of law for the rich, and a different rule for the poor. It extends its protecting shield over all alike. The common law is justly distinguished for its solicitude for the public safety, and any person or corporation that illegally imperils the lives, limbs, or health of the people is liable. The tunnel company has no more right, by

having a dangerous excavation in the public ways, unnecessarily to impose upon the rich the duty to employ an attendant for their children than to impose upon the poor the impracticable duty of never allowing their children to escape from sight, lest they may be injured by its wrongful and illegal act." In a Missouri case *Wagner, J.*, said: "People in the situation in life of those who had the custody of the child cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it so escapes": *Isabel v. R. R. Co.*, 60 Mo. 483. In another case the same judge said: "To say that it is negligence to permit a child to go out to play, unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor": *O'Flaherty v. R. R. Co.*, 45 Mo. 74. In a case very similar to this, another very learned and capable judge used the following language: "The doctrine which imputes the negligence of the parents to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger necessarily requiring the care of the adult to be constantly exercised, as where a parent

The character of the place where the child is permitted to go is relevant on the question of the parent's negligence.¹ So evidence that the infant is possessed of more than ordinary intelligence, activity, and discretion for one of its years is admissible.² If a child, though *non sui juris*, has not committed or omitted any act which would constitute negligence in a person of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child.³

ILLUSTRATIONS.—A boy was riding with his mother in a carriage driven by her servant. The carriage was struck by a train. The driver was negligent in not looking, and the mother in not directing the driver to look. *Held*, that their negligence was the boy's negligence, and that he could not recover against the railroad company: *Slater v. R. R. Co.*, 71 Iowa, 209. A father having passed through a space of fifteen or twenty inches wide between the rear cars of two freight trains standing on a side-track, within five or ten minutes afterwards returned in company with his daughter, between eight and nine years of age. As the father and daughter approached within five or six feet of the opening, in answer to an inquiry from the daughter as to how he got through, the father pointed out the opening, and in his immediate view the daughter proceeded to follow his directions in passing through the opening, and was injured by the cars going together, the cars being moved by an engine that was about starting one of the trains from the side-track. This opening was a few feet east of the east line of a

takes a child into the cars, and, by his neglect, suffers it to be injured by straying off upon the platform. But here a mother, toiling for her daily bread, and having done the best she could in the midst of her necessary employment, loses sight of the child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it; then why should the wrong not be compensated?" *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628.

¹ *Karr v. Parks*, 40 Cal. 188; *Chicago etc. R. R. Co. v. Starr's Adm'r*, 42 Ill. 174; *Pittsburgh etc. R. R. Co. v. Vining's Adm'r*, 27 Ind. 513; 92 Am. Dec. 269.

² *Oldfield v. R. R. Co.*, 14 N. Y. 310; *Barksdull v. R. R. Co.*, 23 La. Ann. 180; *Lynch v. Smith*, 104 Mass. 53; 6 Am. Rep. 188.

³ *McGarry v. Loomis*, 63 N. Y. 104; 20 Am. Rep. 510; *Ihl v. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Lannen v. R. R. Co.*, 44 N. Y. 459; 46 Barb. 264; *O'Brien v. McGlinchy*, 68 Me. 552; *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Pittsburgh etc. R. R. Co. v. Bumstead*, 48 Ill. 221; 95 Am. Dec. 539.

street crossing. One of the trains entirely blocked up the street, and it was not shown that the men in charge of the train knew that any one was attempting to pass through the opening. In an action by the daughter for the injuries sustained, *held*, that the negligence of the father was imputable to the child: *Stillson v. R. R. Co.*, 67 Mo. 671. Plaintiff, a child nine years old, was made sick by the escape of gas in her father's house. The facts were these: About the middle of the day the father detected the odor of gas in his residence, of which the agent of the defendant was subsequently notified, who, late in the day, discovered the leak to be in the street; consequently it could not be reached, without considerable inconvenience, until the next day. During the night the gas escaped in large quantities, but the parent took no other measures to protect the plaintiff than by twice visiting the plaintiff's sleeping-room and increasing the ventilation, although he himself was made sick by the escape of the gas. Early in the morning he found the plaintiff on the floor of her room, nearly insensible, and found that she had been vomiting from the effects of the gas. *Held*, that the negligence of the father was imputable to the child: *Holly v. Gas Co.*, 8 Gray, 123; 69 Am. Dec. 233. The plaintiff was a child twelve years of age. A ditch dug by the father's landlord, by the side of their house, for drainage purposes, extended into the street. There was no way to go from the house to the privy used therewith, without either crossing the ditch or passing around that end of it which was in the street. On a very dark night, the plaintiff, while attempting to reach the water-closet by passing around the end of the ditch upon the highway, fell into the ditch and was seriously injured. In an action against the town for this injury, *held*, that, as the father had suffered the ditch to remain open for several weeks before the accident, his negligence was such that it must be imputed to the plaintiff, so as to preclude a recovery: *Leslie v. Lewiston*, 62 Me. 468. The father of the plaintiff, a child two years and four months old, had taken him across the street to purchase some candy for him. After making the purchase, the father went with the child to the door of the shop, looked up and down the street, and seeing no horse, person, or other impediment in the street, directed the plaintiff to go across the street to his home. The street was about eighteen feet wide between the curb-stones, and the shop in question was not directly opposite the door of the house of the plaintiff's father, but about thirty feet farther up the street. Having given the above direction, the father turned away, without watching to see whether the child crossed the street in safety. Within two minutes the child, while in the street, was run down by a baker's cart owned by the defendant, and driven by him down the street upon a

gallop. *Held*, that the father was guilty of negligence, and the plaintiff could not recover: *Callahan v. Bean*, 9 Allen, 401. A child strayed from home without the knowledge or consent of its parents, and got upon a railroad track, where it was injured. Its father was away from home at the time, and its mother had charge of an infant and had no servant. *Held*, that the father was not chargeable with contributory negligence: *Frick v. R. R. Co.*, 75 Mo. 542. An adult, having the care of a girl eight years old, left a horse-car with her and went immediately upon an adjacent horse-car track, without having hold of the child, and without giving attention to possible danger, except in one direction. The child was run over by a car coming from the other direction. *Held*, that the guardian was chargeable with contributory negligence: *Reed v. R. R. Co.*, 34 Minn. 557. A railroad tunnel, at a point where it was uncovered, and within the line of a public street, was left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The plaintiff, a boy of four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh-bone. His parents were poor and unable to employ a servant to look after him. *Held*, that the plaintiff was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents: *Hagan's Case*, 5 Dill. 96. The plaintiff, a child three or four years old, was locked in the house, but lost sight of by the person having him in charge, for about twenty minutes. His only means of access to the street was by climbing out of an open window, which only came within four feet of the floor. There was no evidence that he had ever before got out of this window, or attempted to. *Held*, that the failure to guard this aperture did not warrant the conclusion, as matter of law, that the parent was guilty of negligence: *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66. The plaintiff, a child five years of age, was permitted by her elder sister to accompany another child, eleven years of age, upon a walk. During their wanderings, the pair got upon a street-car, in leaving which the plaintiff was injured by the concurrent negligence of the defendant's driver and the child having the plaintiff in charge. *Held*, that the negligence of her companion could not be imputed to the plaintiff: *Pittsburg etc. R. R. Co. v. Caldwell*, 74 Pa. St. 421. A mother allowed her child, seven years old, to serve the drivers and conductors of a street-railroad with water upon the cars, for a small compensation. While so employed the child

was injured by the alleged negligence of the company. *Held*, that the mother was guilty of such contributory negligence as barred her recovery as administratrix of the child: *Smith v. R. R. Co.*, 92 Pa. St. 450; 37 Am. Rep. 705.

§ 1211. **Imputed Negligence in Other Cases.**—The doctrine of imputed negligence has been applied in some cases where a passenger has been injured by the concurrent negligence of a third person and of the carrier in whose charge he was riding at the time.¹

ILLUSTRATIONS.—R., plaintiff's intestate, was riding on a public highway with her husband, who was driving. In attempting to cross defendant's tracks at a crossing, they were both killed by a collision with a passing train. In an action to recover damages, it appeared that at this crossing, in the absence of obstructions, a train upon the freight-track, which came first, or upon the passenger-track, which was seventy feet distant from the freight-track, was visible for a distance of one or two miles. In approaching the freight-track the husband stopped his horse when a hundred or more yards away, and then again within fifteen yards of the crossing on account of the passage of a freight train. As soon as it had passed, he crossed the freight-track, and in an endeavor to cross the passenger-track the collision occurred. There was no proof as to the manner of the accident, except that the horse was seen jumping to get across, and did, in fact, escape. The plaintiff was nonsuited. *Held*, error; that if the husband was negligent, his negligence could not be imputed to the wife; that while she had no right, because her husband was driving, to omit reasonable and prudent efforts to see for herself that the crossing was safe, she was not bound to suspect a purpose on the part of her husband to cross until she saw it being executed; that the presumption was, they both saw the approaching train, and she was not blamable in thinking and expecting he would stop again; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins, or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might not have had time or might have been paralyzed from fright, and the question was one of fact for a jury: *Hoag v. R. R. Co.*, 111 N. Y. 199.

¹ See *post*, Division III., Common Carriers.

§ 1212. Burden of Proof of Contributory Negligence.

—In a number of states it is held that in order to make out a *prima facie* case the plaintiff must not only show negligence on the part of the defendant, but he must also show that he was in the exercise of due care in respect to the occurrence from which the injury arose.¹ In others, the rule is, that the negligence of the plaintiff contributing to the injury is a matter of defense, and that the *onus* of

¹ *Connecticut*. — *Beers v. R. R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 339; *Fox v. Glastenbury*, 29 Conn. 204.

Illinois. — *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Dyer v. Talcott*, 16 Ill. 300; *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323; *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago etc. R. R. Co. v. Hazzard*, 26 Ill. 373; *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 272; *Kepplerly v. Ramsden*, 83 Ill. 354; *Galena etc. R. R. Co. v. Yarwood*, 17 Ill. 509; 65 Am. Dec. 683; *Chicago etc. R. R. Co. v. Dewey*, 26 Ill. 255; 79 Am. Dec. 374; *Chicago etc. R. R. Co. v. Freeman*, 6 Ill. App. 608.

Indiana. — *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31; *Evansville etc. R. R. Co. v. Dexter*, 24 Ind. 411; *Evansville etc. R. R. Co. v. Hiatt*, 17 Ind. 102; *Indiana etc. R. R. Co. v. Greene*, 106 Ind. 279; 55 Am. Dec. 736; *Toledo etc. R. R. Co. v. Brannagan*, 75 Ind. 490; *Stevens v. Gravel Co.*, 99 Ind. 392.

Iowa. — *Rusch v. Davenport*, 6 Iowa, 443; *Reynolds v. Hindman*, 32 Iowa, 146, 148; *Plaster v. R. R. Co.*, 35 Iowa, 449; *Carlin v. R. R. Co.*, 37 Iowa, 316; *Muldowney v. R. R. Co.*, 39 Iowa, 615; 36 Iowa, 462; 32 Iowa, 176; *Patterson v. R. R. Co.*, 38 Iowa, 279; *Way v. R. R. Co.*, 40 Iowa, 341; *Donaldson v. R. R. Co.*, 18 Iowa, 280; 87 Am. Dec. 390; *Burns v. R. R. Co.*, 69 Iowa, 450; 58 Am. Rep. 227. But it may be inferred from circumstances, without being directly shown: *Nelson v. R. R. Co.*, 38 Iowa, 564; *Murphy v. R. R. Co.*, 45 Iowa, 661; 38 Iowa, 539; *Raymond v. R. R. Co.*, 65 Iowa, 152.

Maine. — *Gleason v. Bremen*, 50 Me. 222, 224; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212. See also *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Perkins v. R. R. Co.*, 29 Me. 307; 50 Am. Dec. 589; *Merrill v. Hampden*, 26 Me. 234; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Benson v. Titcomb*, 72 Me. 31; *Lesan v. R. R. Co.*, 77 Me. 85. It may be inferred from circumstances: *French v. Brunswick*, 21 Me. 29; 38 Am. Dec. 250; *Foster v. Dixfield*, 18 Me. 380.

Massachusetts. — *Lane v. Crombie*, 12 Pick. 177; *Adams v. Carlisle*, 21 Pick. 146; *Bigelow v. Rutland*, 4 Cush. 247; *Bosworth v. Swansey*, 10 Met. 363, 365; 43 Am. Dec. 441; *Parker v. Adams*, 12 Met. 415, 417; 46 Am. Dec. 694; *Lucas v. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Robinson v. R. R. Co.*, 7 Gray, 92; *Callahan v. Bean*, 9 Allen, 401; *Hickey v. R. R. Co.*, 14 Allen, 429, 431; *Gaynor v. R. R. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390; *Allyn v. R. R. Co.*, 105 Mass. 77; *Lane v. Atlantic Works*, 107 Mass. 104; *Gahagan v. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 725; *Warren v. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *Gilman v. R. R. Co.*, 10 Allen, 233; 87 Am. Dec. 635; *Butterfield v. R. R. Co.*, 10 Allen, 532; 87 Am. Dec. 678. And may be inferred without direct proof: *Mayo v. R. R. Co.*, 104 Mass. 137; *Prentiss v. Boston*, 112 Mass. 43; *Hinckley v. R. R. Co.*, 120 Mass. 257, 262.

Michigan. — *Detroit etc. R. R. Co. v. Van Steinberg*, 17 Mich. 99.

Mississippi. — *Vicksburg v. Hennessey*, 54 Miss. 391; 28 Am. Rep. 354.

North Carolina. — *Owens v. R. R. Co.*, 88 N. C. 502.

proving it is on the defendant.¹ In New York² and other states, the decisions are contradictory and irreconcilable.³

¹ *Alabama*. — *Smoot v. Wetumpka*, 24 Ala. 112; *Seals v. Edmondson*, 71 Ala. 509; *Thompson v. Duncan*, 76 Ala. 334; *Montgomery etc. R. R. Co. v. Chambers*, 79 Ala. 338.

Arkansas. — *Texas etc. R. R. Co. v. Orr*, 46 Ark. 182; *Little Rock etc. R. R. Co. v. Atkins*, 46 Ark. 423; *Little Rock etc. R. R. Co. v. Everett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Little Rock etc. R. R. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245.

California. — *Gay v. Winter*, 34 Cal. 153, 164; *Robinson v. R. R. Co.*, 48 Cal. 409, 426; *McQuilken v. R. R. Co.*, 50 Cal. 7; *McDougall v. R. R. Co.*, 63 Cal. 431.

Kansas. — *Kansas etc. R. R. Co. v. Pointer*, 14 Kan. 87; 9 Kan. 620; *St. Louis etc. R. R. Co. v. Weaver*, 35 Kan. 412.

Kentucky. — *Paducah etc. R. R. Co. v. Hoehl*, 12 Bush, 41; *Louisville etc. Canal Co. v. Murphy*, 9 Bush, 522.

Maryland. — *Frech v. R. R. Co.*, 39 Md. 574; *Irwin v. Sprigg*, 6 Gill, 200, 206; 46 Am. Dec. 667; *Baltimore v. Marriott*, 9 Md. 160; *County Com. of Prince George Co. v. Burgess*, 61 Md. 29.

Minnesota. — *Hocum v. Weitherick*, 22 Minn. 152.

Missouri. — *Thompson v. R. R. Co.*, 51 Mo. 190; 11 Am. Rep. 443; *Hicks v. R. R. Co.*, 65 Mo. 34; 64 Mo. 430; *Schuerman v. R. R. Co.*, 3 Mo. App. 565; *Buesching v. Gas Co.*, 73 Mo. 219; 39 Am. Rep. 503; *Thorpe v. R. R. Co.*, 89 Mo. 650; 58 Am. Rep. 120; *O'Connor v. R. R. Co.*, 94 Mo. 150; 4 Am. St. Rep. 364.

New Jersey. — *New Jersey Express Co. v. Nichols*, 32 N. J. L. 166; 33 N. J. L. 434; 97 Am. Dec. 722; *Durant v. Palmer*, 29 N. J. L. 544; *Moore v. R. R. Co.*, 24 N. J. L. 268.

Pennsylvania. — *Beatty v. Gilmore*, 16 Pa. St. 463; 55 Am. Dec. 514; *Erie v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Bush v. Johnston*, 23 Pa. St. 209; *Hays v. Gallagher*, 72 Pa. St. 136; *Allen v. Willard*, 57 Pa. St. 374; *Mallory v. Griffey*, 85 Pa. St. 275; *Weiss v. R. R. Co.*, 79 Pa. St. 387; *Pennsylvania etc. R. R. Co. v.*

Weber, 76 Pa. St. 157; 18 Am. Rep. 407.

Texas. — *Dallas etc. R. R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297; *Houston etc. R. R. Co. v. Cowser*, 57 Tex. 293.

Vermont. — *Hill v. New Haven*, 37 Vt. 501; 88 Am. Dec. 613.

Wisconsin. — *Prideaux v. Mineral Point*, 43 Wis. 513, 524; 28 Am. Rep. 558; *Hoyt v. Hudson*, 41 Wis. 105; 22 Am. Rep. 714; *Achtenhagen v. Watertown*, 18 Wis. 331; 86 Am. Dec. 769; *Potter v. R. R. Co.*, 20 Wis. 533; 91 Am. Dec. 444; 22 Wis. 615; 21 Wis. 372; *Milwaukee etc. R. R. Co. v. Hunter*, 11 Wis. 160; 78 Am. Dec. 699; overruling the contrary doctrine in *Dressler v. Davis*, 7 Wis. 572, and *Chamberlain v. R. R. Co.*, 7 Wis. 427, 431.

² The plaintiff must prove the absence of contributory negligence on his part: *Warner v. R. R. Co.*, 44 N. Y. 465; reversing 45 Barb. 299; *Besiegel v. R. R. Co.*, 14 Abb. Pr., N. S., 29; *Curran v. Warren etc. Mfg. Co.*, 36 N. Y. 153; *Suydam v. R. R. Co.*, 41 Barb. 375; *De Benedetti v. Mauchin*, 1 Hilt. 213; *Burke v. R. R. Co.*, 34 How. Pr. 239; *Holbrook v. R. R. Co.*, 12 N. Y. 236; 44 Am. Dec. 502; 16 Barb. 113; *Spencer v. R. R. Co.*, 5 Barb. 337; *Ryan v. R. R. Co.*, 1 Jones & S. 137; *Gillespie v. Newburgh*, 54 N. Y. 468, 471; *Hart v. R. R. Co.*, 84 N. Y. 56; *Jones v. R. R. Co.*, 10 Abb. N. C. 200. But see *Johnson v. R. R. Co.*, 20 N. Y. 65; 75 Am. Dec. 375; 6 Duer, 633; 5 Duer, 21; *Robinson v. R. R. Co.*, 65 Barb. 146; *Hackford v. R. R. Co.*, 6 Lans. 381; 43 How. Pr. 222; *Squire v. R. R. Co.*, 4 Jones & S. 436; *Button v. R. R. Co.*, 18 N. Y. 248; *Lee v. Gas Light Co.*, 98 N. Y. 115.

³ *Lester v. Pittsford*, 7 Vt. 158; *Barber v. Essex*, 27 Vt. 62; *Hyde v. Jamaica*, 27 Vt. 443; *Hill v. New Haven*, 37 Vt. 501; 88 Am. Dec. 613; *Walker v. Westfield*, 39 Vt. 246; *Bove v. Danville*, 53 Vt. 183; *Moore v. Shreveport*, 3 La. Ann. 645; *Walker v. Herron*, 22 Tex. 55, 61; *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415, 417.

In short, it seems that where the courts have decided that the burden of proof is on the plaintiff to show due care on his part, they have also held (where the point has been made) that this proof need not be direct, but may be inferred from the circumstances attending the occurrence causing the injury; and in those states where the doctrine obtains that contributory negligence on the part of the plaintiff is a matter of defense, if his case raises an inference of negligence on his part, he must, in order to make out a *prima facie* case, show that he was guilty of no negligence.¹

¹ Thompson on Negligence, 1178.

CHAPTER LXIII.

EVIDENCE—PLEADING AND DAMAGES.

- § 1213. What is negligence — Evidence of negligence.
- § 1214. Law and fact — When negligence for the court.
- § 1215. When negligence for the jury.
- § 1216. Pleading.
- § 1217. Measure of damages—Loss of time—Incapacity to labor—Expenses.
- § 1218. Pain and suffering — Physical and mental.
- § 1219. Exemplary and punitive damages.
- § 1220. Mitigation of damages.
- § 1221. Amount of damage—Verdict sustained.
- § 1222. Verdicts set aside as excessive.

§ 1213. What is Negligence—Evidence of Negligence.

—Negligence is in law a relative term, implying the non-observance of or omission to perform a duty which is prescribed by law, or which arises from the situation of the parties and the circumstances surrounding the transaction,¹ and the degree of care and vigilance which they usually impose.² Where there is no duty to be cautious and vigilant, there can be no negligence in the legal sense of the term.³

In certain cases, from the fact alone of the injury, a presumption of negligence arises. The most frequent of these cases is that of an injury to a passenger. Here negligence on the part of the carrier is presumed; for he is bound by law and by his contract to carry the passenger safely. So where the injury arises from a neglect on the part of a person to perform a duty enjoined on him by statute. Here the same rule applies.⁴ Another instance of this presumption of negligence from the happening of an accident, and where the maxim *Res ipsa*

¹ Kelly v. R. R. Co., 65 Mich. 186;
8 Am. St. Rep. 876.

² Hays v. R. R. Co., 70 Tex. 602;
8 Am. St. Rep. 624.

³ Morris v. Brown, 111 N. Y. 318;
7 Am. St. Rep. 751.

⁴ See *post*, Title Bailments.

loquitur applies, occurs where the happening of the accident is out of the ordinary run of things, and is not what would generally result in the absence of some want of care. When the plaintiff shows damage from an act of defendant, which act, with the exercise of proper care, would not ordinarily produce damage, he makes out a *prima facie* case of negligence, and throws the burden of proof on defendant.¹ This principle is well stated by an English judge in a case in which a packing-case fell on the plaintiff.² He said: "There is abundant evidence that the plaintiff (defendant) was responsible for this packing-case. It was his; it was close to his premises, and there was evidence that his servant was watching it. If, therefore, it was in an unsafe position, and did damage, he is responsible. Was there, then, evidence of this? I think there was; and that this is one of those cases in which, as has been said, *Res ipsa loquitur*. Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing-case was caused by the act of some one who was not the defendant's servant. But as in *Byrne v. Boadle*³ it was said that casks of flour do not roll out of windows naturally, and that if one of them falls in the course of being handed out, that is *prima facie* negligence in those who are handing it out; and as in *Scott v. London etc. Dock Company*⁴ it was said that if a bag of sugar, on being let down in a sling, falls, that is *prima facie* evidence of its having been improperly placed in the sling,—so here the facts show a *prima facie* case. The substance of the matter is, that a packing-case, for which the defendant was responsible, fell on the plaintiff and injured him, and that raises a question for the jury as to the defendant's negligence." So in a case where a brick fell from the wall of a bridge and injured the

¹ *Moore v. Parker*, 91 N. C. 275;
Bevis v. R. R. Co., 26 Mo. App. 19.

² *Briggs v. Oliver*, 4 Hurl. & C. 403.

³ 2 Hurl. & C. 722.

⁴ 3 Hurl. & C. 596.

plaintiff,¹ Cockburn, C. J., said: "The brick being loose affords, *prima facie*, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brick-work appears to have been, from causes operating so speedily as to prevent the possibility of any diligence and care, applied to such a purpose, intervening in due time so as to prevent an accident. But inasmuch as our experience of these things is, that bricks do not fall out when brick-work is kept in a proper state of repair, I think, where an accident of this sort happens, the presumption is, that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brick-work as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply. On the other hand, I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of this brick-work."²

Thus in cases of the following character it has been held that from the fact of the accident a presumption of negligence arises, viz.: Where a bridge gives way when a train is passing over it;³ where a steamboat or a locomotive bursts its boiler;⁴ where a train runs off a track;⁵ where the wheel of a stage-coach breaks;⁶ where a rail of a railroad-track breaks;⁷ where the shade of a lamp in a car falls;⁸ where a cinder falls from the

¹ *Kearney v. R. R. Co.*, L. R. 5 Q. B. 411; L. R. 6 Q. B. 759.

² And see *Mullen v. St. John*, 57 N. Y. 567; *Vincett v. Cook*, 4 Hun, 318.

³ *Bedford etc. R. R. Co. v. Rainbolt*, 99 Ind. 551.

⁴ *The Sydney*, 27 Fed. Rep. 119; *Robinson v. R. R. Co.*, 20 Blatchf. 338; *Rose v. Travis Co.*, 20 Blatchf. 411. *Contra*, as to a saw-mill: *Young v. Bransford*, 12 Lea, 232.

⁵ *Cent. R. R. Co. v. Sanders*, 73 Ga. 513; *Murphy v. R. R. Co.*, 36 Hun, 199; *Texas etc. R. R. Co. v. Suggs*, 62 Tex. 323.

⁶ *Lawrence v. Green*, 70 Cal. 417; 59 Am. Rep. 428.

⁷ *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264.

⁸ *White v. R. R. Co.*, 144 Mass. 404.

engine of an elevated railroad;¹ where a cistern-wall while being built falls from its own weight or from the pressure of earth placed behind it;² where one is injured by a board or plank falling from another's premises;³ where in removing a cargo of ore from a vessel in a large bucket the bucket tips over;⁴ where one is injured at night by cars being loaded with timbers projecting seven feet beyond the track;⁵ where a steamboat is run without a license, in violation of the federal statute, if its boiler bursts, the cause of the explosion will be presumed to be the failure to have the boiler inspected, and this presumption must be rebutted.⁶ But where an injury is equally liable to have happened in either of two ways, by accident or by defendant's negligence, it must be shown to have happened in the latter way in order that defendant may be held liable.⁷ In these cases the evidence must show a want of care on the part of the defendant.⁸ The burden of establishing the relative degrees of negligence between the plaintiff and defendant is upon the former.⁹

ILLUSTRATIONS. — Defendants, who occupied for business purposes the second and upper floors of a building, were hoisting a box, weighing about five hundred pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor the hooks broke, and the box fell, broke through the hatchway on the first floor, and struck and injured the plaintiff, who was lawfully in the basement. *Held*, evidence of negligence on the part of the defendants warranting a verdict for the plaintiff: *Lyons v. Rosenthal*, 11 Hun, 46. A telegraph-wire swings across the highway so low as to interfere with a traveler's horses. *Held*, evidence of negligence to charge the company with damages sustained by the traveler, whose horses

¹ *Wiedmer v. R. R. Co.*, 41 Hun, 284.

² *Mulcairns v. Janesville*, 67 Wis. 24.

³ *Clare v. National City Bank*, 1 Sweeny, 539.

⁴ *Cummings v. Furnace Co.*, 60 Wis. 603.

⁵ *Baston v. R. R. Co.*, 60 Ga. 339.

⁶ *Van Norden v. Robinson*, 45 Hun, 567.

⁷ *The Nellie Flagg*, 23 Fed. Rep. 671.

⁸ 2 Thompson on Negligence, 1233; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Ackerly v. Sullivan*, 34 La. Ann. 1156; *Federal St. R. R. Co. v. Gibson*, 96 Pa. St. 83; *State v. R. R. Co.*, 58 Md. 221; *Button v. Frink*, 51 Conn. 342; 50 Am. Rep. 24. And see *Higgs v. Maynard*, 1 Har. & R. 581.

⁹ *Chicago etc. R. R. Co. v. Harwood*, 90 Ill. 425.

have become entangled therein: *Thomas v. West. Union Tel. Co.*, 100 Mass. 156. Defendant was under an obligation to keep a bridge in repair, but had suffered it to get out of repair. The plaintiff was found lying under the bridge at midnight on a dark night, hurt. He made no other statement than that he had fallen from the bridge. There was no evidence as to how he came to fall from it. He was in court at the trial, but neither party called him as a witness. *Held*, that there was evidence of negligence for the jury: *Hays v. Gallagher*, 72 Pa. St. 136. Defendant, for the purpose of a concert, hired a public hall and employed a person to decorate it. Among the decorations was a bust placed on the outside of a balcony. The plaintiff sat in a seat on the floor of the hall immediately under the bust. The audience were requested, by the programme, to rise at a certain part of the concert, and when they did so, the bust fell from its place and injured the plaintiff. *Held*, that the mere fact that the bust fell was not sufficient evidence to go to the jury of the defendant's negligence: *Kendall v. Boston*, 118 Mass. 234; 19 Am. Rep. 446. Deceased was found in a dying condition between the tracks of a railroad, having sundry cuts and bruises upon her person. No one saw the accident, but a train had just passed, whose engineer and fireman both testified that they were looking out of the cab windows at the time the train passed, and saw nobody on or near the track. There was no obligation upon the company to ring the bell or blow the whistle at that point, though it was a place where people were in the habit of crossing. *Held*, that there was no evidence of negligence on which the case could be submitted to the jury: *North Cent. R. R. Co. v. State*, 54 Md. 113. A passenger in a railroad car sat with his elbow on the window-sill, but so far within the window that the window could have been closed without touching it. His arm was struck by a swinging door on a passing freight-train. In his action against the railroad company, no explanation of the accident was given. *Held*, that he was entitled to recover, a want of proper care on the part of the company necessarily being inferred: *Breen v. R. R. Co.*, 109 N. Y. 297. Plaintiff, in going to defendant's ferry-boat was obliged to pass through a swinging-door. The door swung back after the person in advance of plaintiff had passed through, and plaintiff, in trying to stop it, thrust his hand through the glass. *Held*, in his action against the company, that a nonsuit should be ordered, there being no showing that the door was improperly constructed or used: *Hayman v. R. R. Co.*, 118 Pa. St. 508.

§ 1214. Law and Fact—When Negligence for the Court.—When the circumstances of a case are such that

the standard of duty is fixed, when the measure of duty is defined by law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court.¹ "It is frequently stated that when the facts are undisputed or conclusively proved, the question of negligence is to be decided by the court."² A better opinion, however, would seem to be, that in order to justify the withdrawal of the case from the jury the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable.³ Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury."⁴ If the case is such

¹ 2 Thompson on Negligence, 1236; citing *West Chester etc. R. R. Co. v. McElwee*, 67 Pa. St. 311; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Balt. etc. R. R. Co. v. Breinig*, 25 Md. 378; 90 Am. Dec. 49; *Reading etc. R. R. Co. v. Ritchie*, 102 Pa. St. 425.

² *Gavett v. R. R. Co.*, 16 Gray, 501; 77 Am. Dec. 423; *Gagg v. Vetter*, 41 Ind. 228, 254; 13 Am. Rep. 322; *Louisville Canal Co. v. Murphy*, 9 Bush, 522; *Costello v. Landwehr*, 28 Wis. 522, 529; *Grigsby v. Chappel*, 5 Rich. 446; *Pittsburgh etc. R. R. Co. v. Evans*, 53 Pa. St. 250; *Flemming v. R. R. Co.*, 49 Cal. 253; *Van Lien v. Scoville Mfg. Co.*, 4 Daly, 554; *Foot v. Wiswall*, 14 Johns. 304; *Thrings v. R. R. Co.*, 7 Rob. (N.Y.) 616; *Biles v. Holmes*, 11 Ired. 16; *Dascomb v. R. R. Co.*, 27 Barb. 221; *Dublin etc. R. R. Co. v. Slattery*, 3 App. Cas. 1155, 1201; *Warren v. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *Snow v. R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720; *Gonzales v. R. R. Co.*, 38 N. Y. 440; 98 Am. Dec. 58; *Johnson v. Bruner*, 61 Pa. St. 58; 100 Am. Dec. 613; *O'Neill v. R. R. Co.*, 1 McCrary, 505; *Abbett v. R. R. Co.*, 30 Minn. 482; *Wallace v. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 347.

³ *McLain v. Van Zandt*, 7 Jones & S. 347; *Ohio & M. R. R. Co. v. Colarn*, 73 Ind. 261; 38 Am. Rep. 134.

⁴ *City R. R. Co. v. Lee*, 50 N. J. L. 435; 7 Am. St. Rep. 798; *Railroad Co. v. Stout*, 17 Wall. 657; *De-*

troit etc. R. R. Co. v. Van Steinburg, 17 Mich. 99; *Beers v. R. R. Co.*, 19 Conn. 566; *Vinton v. Schwab*, 32 Vt. 612; *Wyatt v. R. R. Co.*, 55 Mo. 485; *Norton v. Ittner*, 56 Mo. 351; *Jenkins v. R. R. Co.*, 2 Disn. 49; *Stoddard v. R. R. Co.*, 65 Mo. 514; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *McGrath v. R. R. Co.*, 32 Barb. 144; *State v. Railroad*, 52 N. H. 529; *Gaynor v. R. R. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; *Pennsylvania etc. R. R. Co. v. Ogier*, 35 Pa. St. 60; 78 Am. Dec. 322; *Creed v. Hartmann*, 29 N. Y. 591; 86 Am. Dec. 341; *Johnson v. R. R. Co.*, 11 Minn. 296; 88 Am. Dec. 83; *Hill v. New Haven*, 37 Vt. 501; 88 Am. Dec. 613; *Balt. etc. R. R. Co. v. Miller*, 29 Md. 252; 96 Am. Dec. 528; *Quirk v. Holt*, 99 Mass. 164; 96 Am. Dec. 725; *Gaynor v. R. R. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Mulligan v. Curtis*, 100 Mass. 512; 97 Am. Dec. 121; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380; 97 Am. Dec. 402; *Detroit etc. R. R. Co. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141; *North Cent. etc. R. R. Co. v. State*, 31 Md. 357; 100 Am. Dec. 69; *Ernst v. R. R. Co.*, 39 N. Y. 61; 100 Am. Dec. 405; *Pennsylvania etc. R. R. Co. v. Righter*, 42 N. J. L. 180; *Sheff v. Huntington*, 16 W. Va. 307; *Vickers v. R. R. Co.*, 64 Ga. 635; *Kansas etc. R. R. Co. v. Richardson*, 25 Kan. 391; *Kansas etc. R. R. Co. v. Owen*, 25 Kan. 419; *Terpel v. Hilsen-*

that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of

piger, 44 Mich. 461; *Hart v. R. R. Co.*, 80 N. Y. 622; *Kelly v. R. R. Co.*, 70 Mo. 614; *Johnson v. R. R. Co.*, 49 Wis. 529; *Osage City v. Brown*, 27 Kan. 74; *Pittsburgh etc. R. R. Co. v. Wright*, 80 Ind. 182, 236; *Penn. Co. v. Conlan*, 101 Ill. 93; *Chicago etc. R. R. v. Klauber*, 9 Ill. App. 613; *Marcott v. R. R. Co.*, 47 Mich. 1; *Townley v. R. R. Co.*, 53 Wis. 626; *Bierbach v. R. R. Co.*, 14 Fed. Rep. 826; 15 Fed. Rep. 490; *Hall v. R. R. Co.*, 16 Fed. Rep. 744; *Tuttle v. Farmington*, 58 N. H. 13; *Griffin v. Auburn*, 58 N. H. 121; *Sleeper v. R. R. Co.*, 58 N. H. 520; *Goodrich v. R. R. Co.*, 29 Hun, 50; *Bell v. R. R. Co.*, 29 Hun, 560; *Merritt v. Fitzgibbons*, 29 Hun, 634; *Payne v. Reese*, 100 Pa. St. 301; *Frick v. R. R. Co.*, 75 Mo. 575; *Terre Haute etc. R. R. Co. v. Jones*, 11 Ill. App. 322; *Ramsay v. R. R. Co.*, 81 Ind. 394; *Ruland v. South Newmarket*, 59 N. H. 291; *Fassett v. Roxbury*, 55 Vt. 552; *Brooks v. R. R. Co.*, 135 Mass. 21; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *O'Connor v. R. R. Co.*, 135 Mass. 352; *Copley v. R. R. Co.*, 136 Mass. 6; *White v. R. R. Co.*, 136 Mass. 321; *Palmer v. Dearing*, 93 N. Y. 7; *Guy v. R. R. Co.*, 30 Hun, 399; *William v. R. R. Co.*, 31 Hun, 392; *Longnecker v. R. R. Co.*, 105 Pa. St. 328; *Nanticoke v. Wanec*, 106 Pa. St. 373; *Brown v. R. R. Co.*, 15 Phila. 321; *East Tennessee R. R. Co. v. Bayless*, 74 Ala. 150; *Farris v. R. R. Co.*, 80 Mo. 325; *Kenney v. R. R. Co.*, 80 Mo. 573; *Seoville v. R. R. Co.*, 81 Mo. 434; *Atkinson v. Goodrich Trans. Co.*, 60 Wis. 141; 50 Am. Rep. 352; *White v. R. R. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Dall v. R. R. Co.*, 62 Wis. 652; *Mark v. R. R. Co.*, 32 Minn. 208; *Hutchinson v. R. R. Co.*, 32 Minn. 398; *Corey v. R. R. Co.*, 32 Minn. 457; *Stocker v. Minneapolis*, 32 Minn. 478; *Hynes v. R. R. Co.*, 65 Cal. 316; *Philbrick v. Niles*, 25 Fed. Rep. 265; *Mattley v. Machine Co.*, 140 Mass. 337; *Somer v. R. R. Co.*, 141 Mass. 10; *McKimble v. R. R. Co.*, 141 Mass. 463; *Dixon v. R. R. Co.*, 100 N. Y. 170; *Greany v. R. R. Co.*, 101 N. Y. 419; *Moebus v. Hermann*, 38 Hun, 370; *Palmer v. R. R. Co.*, 56 Mich. 1; *John-*

son v. R. R. Co., 18 Neb. 690; *Lincoln v. Gulian*, 18 Neb. 114; *Dunlavy v. R. R. Co.*, 66 Iowa, 435; *Henry v. R. R. Co.*, 66 Iowa, 52; *Crowley v. R. R. Co.*, 65 Iowa, 658; *Near v. Canal Co.*, 32 Hun, 557; *Flagg v. R. R. Co.*, 49 N. Y. Sup. Ct. 251; *Vosper v. New York*, 49 N. Y. Sup. Ct. 296; *Dawson v. Sloan*, 49 N. Y. Sup. Ct. 304; *Munroe v. R. R. Co.*, 50 N. Y. Sup. Ct. 114; *Rooney v. Steamship Co.*, 10 Daly, 241; *Boon v. R. R. Co.*, 101 Pa. St. 334; *Cumberland Valley R. R. Co. v. Mangans*, 61 Md. 53; 48 Am. Rep. 88; *Moore v. R. R. Co.*, 2 Mackey, 437; *Texas etc. R. R. Co. v. Levi*, 59 Tex. 674; *Houston etc. R. R. Co. v. Simpson*, 60 Tex. 103; *Texas etc. R. R. Co. v. Herbeck*, 60 Tex. 602; *Missouri etc. R. R. Co. v. Cornell*, 30 Kan. 35; *White v. R. R. Co.*, 31 Kan. 280; *Albion v. Hetrick*, 90 Ind. 545; 46 Am. Rep. 230; *Chicago etc. R. R. Co. v. Warner*, 108 Ill. 536; *Sloan v. R. R. Co.*, 62 Iowa, 728; *Bohan v. R. R. Co.*, 58 Wis. 30; *Gibbons v. R. R. Co.*, 58 Wis. 335; *Denby v. Wieler*, 59 Wis. 240; *Martin v. R. R. Co.*, 31 Minn. 417; *Loucks v. R. R. Co.*, 31 Minn. 526; *Nebrhas v. R. R. Co.*, 62 Cal. 320; *Walsh v. R. R. Co.*, 10 Or. 250; *Lesan v. R. R. Co.*, 77 Me. 85; *Morse v. Belfast*, 77 Me. 44; *Lewis v. R. R. Co.*, 60 N. H. 187; *Tyler v. R. R. Co.*, 137 Mass. 278; *Remer v. R. R. Co.*, 34 Hun, 153; *Northrup v. R. R. Co.*, 37 Hun, 295; *Pennsylvania etc. R. R. Co. v. Reed*, 17 Ill. App. 413; *Chicago etc. R. R. Co. v. Carey*, 115 Ill. 115; *Evans etc. Brick Co. v. R. R. Co.*, 21 Mo. App. 648; *Stafford v. R. R. Co.*, 22 Mo. App. 333; *Dunn v. R. R. Co.*, 21 Mo. App. 188; *White v. R. R. Co.*, 20 Mo. App. 564; *Cook v. R. R. Co.*, 19 Mo. App. 329; *Gubasco v. New York*, 12 Daly, 183; *Newell v. Ryan*, 40 Hun, 286; *Webster v. R. R. Co.*, 40 Hun, 161; *Williams v. R. R. Co.*, 39 Hun, 430; *Drain v. R. R. Co.*, 86 Mo. 574; *Int. etc. R. R. Co. v. Ormond*, 64 Tex. 485; *Pennsylvania etc. R. R. Co. v. Garvey*, 108 Pa. St. 369; *Am. S. S. Co. v. Landreth*, 108 Pa. St. 264; *Young v. R. R. Co.*, 56 Mich. 430; *Lowell v. Watertown*, 58 Mich. 568; *Ferguson v. R. R. Co.*, 63 Wis.

due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, "In the judgment of the law this conduct was negligent," or, as the case might be, "There is nothing in the evidence here which tends to show a want of due care." In either case he draws the conclusion of negligence or the want of it as one of law."¹

145; *Orange etc. R. R. Co. v. Ward*, 47 N. J. L. 560; *Dahl v. R. R. Co.*, 65 Wis. 371; *Leavitt v. R. R. Co.*, 64 Wis. 228; *Dufour v. R. R. Co.*, 67 Cal. 319; *Ferren v. R. R. Co.*, 143 Mass. 197; *Smith v. Wildes*, 143 Mass. 156; *Moynihan v. Whidden*, 143 Mass. 257; *Delory v. Canny*, 144 Mass. 445; *Muller v. Dist. of Columbia*, 5 Mackey, 286; *McDade v. R. R. Co.*, 5 Mackey, 144; *Baltimore etc. R. R. Co. v. Rose*, 65 Md. 485; *Lehigh etc. R. R. Co. v. Brandtmeier*, 113 Pa. St. 610; *Baltimore etc. R. R. Co. v. Owings*, 65 Md. 485; *Neslie v. R. R. Co.*, 113 Pa. St. 300; *Lee v. Woolsey*, 109 Pa. St. 124; *Berry v. R. R. Co.*, 48 N. J. L. 141; *Francis v. Steam Co.*, 13 Daly, 510; *Craig v. R. R. Co.*, 13 Daly, 214; *Lindeman v. R. R. Co.*, 42 Hun, 306; *Crabell v. Coal Co.*, 68 Iowa, 751; *Nichols v. R. R. Co.*, 68 Iowa, 732; *Georgia etc. R. R. Co. v. Williams*, 74 Ga. 723; *Ferguson v. R. R. Co.*, 75 Ga. 637; *Chicago etc. R. R. Co. v. O'Connor*, 119 Ill. 586; *Chicago etc. R. R. Co. v. Bragonier*, 119 Ill. 51; *Alabama etc. R. Co. v. Arnold*, 80 Ala. 600; *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152; *Matthews v. R. R. Co.*, 26 Mo. App. 75; *Keim v. R. R. Co.*, 90 Mo. 314; *Jameson v. R. R. Co.*, 63 Miss. 33; *Leslie v. R. R. Co.*, 88 Mo. 50; *Taylor v. R. R. Co.*, 26 Mo. App. 336; *Petty v. R. R. Co.*, 88 Mo. 306; *Burns v. R. R. Co.*, 69 Iowa, 450; 58 Am. Rep. 227; *Day v. R. R. Co.*, 70 Iowa, 193; *Annas v. R. R. Co.*, 67 Wis. 46; 58 Am. Rep. 848; *Sherman v. R. R. Co.*, 34 Minn. 259; *Barbo v. Bassett*, 35 Minn. 485; *Robel v. R. R.*

Co., 35 Minn. 84; *Hoye v. R. R. Co.*, 67 Wis. 1; *Gibbons v. R. R. Co.*, 66 Wis. 161; *Sheldon v. R. R. Co.*, 59 Mich. 172; *Paryne v. R. R. Co.*, 70 Iowa, 584; *Peck v. R. R. Co.*, 57 Mich. 3; *Guggenheim v. R. R. Co.*, 57 Mich. 488; *Klanowski v. R. R. Co.*, 57 Mich. 525; *Seveke v. R. R. Co.*, 57 Mich. 589.

¹ *Cooley on Torts*, 670; *Rudolph v. Fuchs*, 44 How. Pr. 155, 160; *Houfe v. Fulton*, 29 Wis. 296; *Fernandez v. R. R. Co.*, 52 Cal. 45. In *R. R. Co. v. Stout*, 17 Wall. 657, the supreme court of the United States say: "It is true, in many cases, that where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach-driver inten-

The cases in which the question of negligence is one for the court to decide are comparatively rare. In the large majority of cases the question of negligence under the evidence is one of fact for the jury.¹ The following have been held to be properly decided by the court: Whether a particular person is a "fellow-servant" of another;² whether a rule of a railroad is reasonable;³ whether authority to receive notice is within the scope of

tionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than

does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury, and not for the judge, to determine whether proper care was given, or whether they establish negligence."

¹ *Detroit R. R. Co. v. Van Steinburg*, 17 Mich. 97; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 545; *R. R. Co. v. Stout*, 17 Wall. 657; *Hawks v. Northampton*, 121 Mass. 10; *Schmidt v. R. R. Co.*, 83 Ill. 405; *Chicago etc. R. R. Co. v. Lee*, 60 Ill. 501; *Cramer v. City of Burlington*, 42 Iowa, 315; *Artz v. R. R. Co.*, 44 Iowa, 284; *Belair v. R. R. Co.*, 43 Iowa, 663; *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274; *Kansas Pacific R. R. Co. v. Brady*, 17 Kan. 380; *Atchison etc. R. R. Co. v. Bales*, 16 Kan. 252; *Perry v. R. R. Co.*, 50 Cal. 578; *McNamara v. R. R. Co.*, 50 Cal. 581; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Keegan v. Kavanaugh*, 62 Mo. 231; *Georgia etc. Co. v. Neeley*, 56 Ga. 541; *Allen v. Hancock*, 16 Vt. 230; *Rice v. Montpelier*, 19 Vt. 470; *Hill v. New Haven*, 37 Vt. 501; 88 Am. Dec. 613; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Smith v. O'Connor*, 48 Pa. St. 218; 86 Am. Dec. 582.

² *Marshall v. Schricker*, 63 Mo. 308; *McGowan v. R. R. Co.*, 61 Mo. 326; *Whalen v. Centenary Church*, 62 Mo. 326.

³ *Chicago etc. R. R. Co. v. McLallen*, 84 Ill. 109.

the duties of a certain agency;¹ whether the omission to give the statutory signals is negligence;² whether (in certain cases) a defect in a highway is unsafe;³ whether a person in traveling on the highway is using due care;⁴ whether it is negligence in walking upon railroad tracks without adequate precautions against the approach of trains;⁵ or crawling under or through cars which have stopped temporarily upon the track;⁶ or crossing railroad tracks upon the highway without looking up or down the track for approaching trains;⁷ or riding upon the platform of a railroad-car,⁸ or with the arm or a portion of the body protruding from a car window;⁹ or leaping from a train of cars in motion;¹⁰ or landing at a place obviously not designed for the reception of passengers.¹¹ The question of proximate or remote cause is a question for the jury, if the facts are disputed, but where they are undisputed, it is for the court.¹²

¹ *Mobile etc. R. R. Co. v. Thomas*, 42 Ala. 672.

² *Chicago etc. R. Co. v. Boggs*, 101 Ind. 522; 51 Am. Rep. 761.

³ *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Schmidt v. R. R. Co.*, 83 Ill. 405. But this is generally a question for the jury: See *post*.

⁴ *Gramlich v. R. R. Co.*, 9 Phila. 78. But this is also generally for the jury: See *post*.

⁵ 2 Thompson on Negligence, 1238.

⁶ 2 Thompson on Negligence, 1238; *Gahaghan v. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 724.

⁷ *Cent. R. R. Co. v. Feller*, 84 Pa. St. 226.

⁸ *Hickey v. R. R. Co.*, 14 Allen, 429; *Quinn v. R. R. Co.*, 51 Ill. 495.

⁹ *To ld v. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; 83 Am. Dec. 679; *Pittsburgh etc. R. R. Co. v. Andrews*, 39 Md. 329; 17 Am. Rep. 569; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Morel v. Mississippi Ins. Co.*, 4 Bush, 535; *Pittsburgh etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 1; 96 Am. Dec. 320; *Holbrook v. R. R.*

Co., 12 N. Y. 236; 64 Am. Dec. 502. *Contra*, *Spencer v. R. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758; *Chicago etc. R. R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 306; *Winters v. R. R. Co.*, 39 Mo. 468; *Barton v. R. R. Co.*, 52 Mo. 253; 14 Am. Rep. 418.

¹⁰ *R. R. Co. v. Aspell*, 23 Pa. St. 147; *Jeffersonville etc. R. R. Co. v. Hendrick's Adm'r*, 26 Ind. 228; *Morrison v. R. R. Co.*, 56 N. Y. 302; *Burrows v. R. R. Co.*, 63 N. Y. 556; *Damont v. R. R. Co.*, 9 La. Ann. 441; 61 Am. Dec. 214; *Dougherty v. R. R. Co.*, 86 Ill. 467; *Gavett v. R. R. Co.*, 16 Gray, 501; 77 Am. Dec. 422; *Lucas v. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Ginnon v. R. R. Co.*, 3 Rob. (N. Y.) 25; *Illinois etc. R. R. Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109; *Ohio etc. R. R. Co. v. Schiebe*, 44 Ill. 460; *Ohio etc. R. R. Co. v. Stratton*, 78 Ill. 88.

¹¹ *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; 37 Pa. St. 420; *Bancroft v. R. R. Co.*, 97 Mass. 275; *Gonzales v. R. R. Co.*, 38 N. Y. 440.

¹² *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; *South etc. R. R. Co. v. Trich*, 117 Pa. St. 390; 2 Am. St. Rep. 672.

ILLUSTRATIONS. — A man with a wagon drove from one of the tracks on which a dummy-engine was run to another track on which he knew that an engine would soon be due. The team got caught in the track, and an accident resulted. *Held*, in an action against the railroad company, that a nonsuit should have been ordered: *Donnelly v. R. R. Co.*, 109 N. Y. 16. Plaintiff's clothes were caught by a broken hook which fastened down the curtains of defendant's open horse-car. It did not appear how the hook broke, nor that any better way of fastening curtains was known, nor that such an accident had happened before. It appeared that the cars were inspected after each trip. *Held*, that the court should have ruled as matter of law that plaintiff could not recover: *Kelly v. R. R. Co.*, 109 N. Y. 44.

§ 1215. When Negligence for Jury.—Whenever there is any doubt as to the facts, it is the province of the jury to determine, not only what they are, but what are the proper inferences to be drawn from them.¹ When the circumstances under which the parties act are complicated, and the general knowledge and experience of mankind do not at once condemn the conduct as careless, the question of negligence is for the jury.² The following have been held to be questions of fact for the jury, viz.: Whether a particular rule adopted by a railroad is sufficient for the safe management of its trains;³ whether a defect in a highway makes it unsafe for travelers;⁴

¹ 2 Thompson on Negligence, 1239; *Johnson v. Bruner*, 61 Pa. St. 58; 100 Am. Dec. 613; *Sawyer v. East. Stbt. Co.*, 46 Me. 400; 74 Am. Dec. 463; *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114; 87 Am. Dec. 486; *Pennsylvania R. R. Co. v. France*, 112 Ill. 398; *Myers v. R. R. Co.*, 113 Ill. 386.

² *Gaynor v. Old Colony etc. R. R. Co.*, 100 Mass. 208; 97 Am. Dec. 96; *Pater-son v. Wallace*, 1 Macq. 748; *Johnson v. R. R. Co.*, 20 N. Y. 65; 75 Am. Dec. 375; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 544; *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *West Chester etc. R. R. Co. v. McElwee*, 67 Pa. St. 311; *Seabrook v. Hecker*, 2 Robt. 291; *Haycroft v. R. R. Co.*, 64 N. Y. 636.

³ *R. R. Co. v. McLallen*, 84 Ill. 109.

⁴ *McMaugh v. Milwaukee*, 32 Wis. 200; *Benedict v. Fond du Lac*, 6 Rep. 799; *Johnson v. Haverhill*, 35 N. H. 82; *Perry v. John*, 79 Pa. St. 412; *Stark v. Lancaster*, 57 N. H. 88; *Stack v. Portsmouth*, 52 N. H. 224; *Rice v. Montpelier*, 19 Vt. 470; *Cassedy v. Stockbridge*, 21 Vt. 391; *Kelsey v. Glover*, 15 Vt. 709; *Independence v. Jeckel*, 38 Iowa, 427; *Hall v. Lowell*, 10 Cush. 260; *Leicester v. Pittsford*, 6 Vt. 245; *Sessions v. Newport*, 23 Vt. 9; *Green v. Danby*, 12 Vt. 338; *Burns v. Elba*, 32 Wis. 605; *Barstow v. Berlin*, 34 Wis. 357; *Cramer v. Portland*, 36 Wis. 92; *Hammond v. Mukwa*, 40 Wis. 35; *Willey v. Belfast*, 61 Me. 569; *Hume v. New York*, 47 N. Y. 639.

whether a person at the time of receiving an injury is traveling upon the highway,¹ or in the exercise of due care in so doing;² whether notice can be presumed from the existence of a defect at a certain time;³ whether an injury is the proximate result of the defendant's negligence;⁴ whether the negligence of the plaintiff contributed directly or proximately to the injury received;⁵ whether the plaintiff's conduct amounting *per se* to contributory negligence was the proximate cause of the injury;⁶ whether a parent is in the exercise of care toward a child in his keeping;⁷ whether a post so stands out in a highway as to be dangerous;⁸ whether plaintiff was negligent in attempting to ride his horse over a bridge which he might have known to be out of repair;⁹ whether one was guilty of negligence in using a sidewalk known by him to be defective;¹⁰ whether a hole in a bridge would frighten a horse of ordinary gentleness;¹¹ whether a passenger in alighting on a track instead of on a platform was negligent;¹² whether a girl of eight, who sat

¹ *Cummings v. Center Harbor*, 57 N. H. 17.

² *Pennsylvania R. R. Co. v. McTighe*, 46 Pa. St. 316; *Fox v. Sackett*, 10 Allen, 535; 87 Am. Dec. 682; *Gillespie v. Newburgh*, 54 N. Y. 468; *Bigelow v. Rutland*, 4 Cush. 247; *Oakland v. Fielding*, 48 Pa. St. 320; *Reed v. Deerfield*, 8 Allen, 522; *Steven v. Boxford*, 10 Allen, 25; *Williams v. Clinton*, 28 Conn. 266; *Maloy v. R. R. Co.*, 58 Barb. 182; *Swift v. Newbury*, 36 Vt. 355; *Clayards v. Dethick*, 12 Q. B. 439; *Pickens v. Diecker*, 21 Ohio St. 212; 8 Am. Rep. 55; *Bateman v. Ruth*, 3 Daly, 378.

³ *Colley v. Westbrook*, 57 Me. 181; 2 Am. Rep. 30; *Bradbury v. Falmouth*, 18 Me. 64.

⁴ *Poeppers v. R. R. Co.*, 67 Mo. 715; 29 Am. Rep. 518; *Patten v. R. R. Co.*, 32 Wis. 524; *Oliver v. La Valle*, 36 Wis. 592; *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664; *Saxton v. Bacon*, 31 Vt. 540; *Littleton v. Richardson*, 32 N. H. 59; 66 Am. Dec. 759.

⁵ *Fernandez v. R. R. Co.*, 52 Cal. 45. See also *Bridge v. R. R. Co.*, 3 Mees. & W. 248; *Davies v. Mann*, 10 Mees. & W. 548; *Colchester v. Brooke*, 7 Q. B. 337; *Radley v. R. R. Co.*, L. R. 9 Ex. 71; 1 App. Cas. 754.

⁶ *North Pennsylvania R. R. Co. v. Heileman*, 49 Pa. St. 60; 88 Am. Dec. 482; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *State v. R. R. Co.*, 52 N. H. 528. But see *R. R. Co. v. Houston*, 95 U. S. 697.

⁷ *Mangam v. R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66; *Kay v. R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628; *Philadelphia etc. R. R. Co. v. Long*, 75 Pa. St. 257; *Pittsburgh etc. R. R. Co. v. Pearson*, 72 Pa. St. 169.

⁸ *Yeaw v. Williams*, 15 R. I. 20.

⁹ *Gulf etc. R. R. v. Gasscamp*, 69 Tex. 545.

¹⁰ *Kendall v. Albia*, 73 Iowa, 241.

¹¹ *Smith v. Sherwood*, 62 Mich. 159.

¹² *Robostelli v. R. R. Co.*, 33 Fed. Rep. 796.

down on a curb-stone to sharpen a pencil on her way to school and was struck by a wagon, was in the exercise of due care;¹ whether plaintiff, in an action to recover for personal injuries sustained from a defective sidewalk, was guilty of negligence in walking along without paying attention, the planking being so rotten that the earth could be seen beneath it;² whether plaintiff was negligent in not sending for a physician sooner than he did;³ whether one is negligent in boarding a street-car while it is moving slowly;⁴ whether one stepping from a train after it was started was careless, and whether the train was started too soon;⁵ whether it was negligence in a railroad company not to use blocks in its yard between the main rail and the guard-rail.⁶ Where alternatives are presented to a traveler upon a highway as modes of escape from collision with an approaching traveler, it is a question of fact whether either might not fairly be chosen by an intelligent and prudent person.⁷

ILLUSTRATIONS.—Plaintiff sued for injuries sustained from an explosion on a steamboat, on which he was a passenger. The explosion was not of the boiler or machinery of the boat, and it was doubtful what caused it. *Held*, that the question of whether the steamboat company had shown itself free from fault was for the jury, and that a verdict for defendant should not be ordered: *Spear v. R. R. Co.*, 119 Pa. St. 61. At a turn-pike a train was divided to admit of the passage of teams. A approached with his team and drove on when beckoned to by a train-hand. When he got to the track a noise was made resembling the putting on of brakes. A's horse became unmanageable, and an injury resulted. *Held*, that the question of defendant's negligence was for the jury: *Pennsylvania R. R. Co. v. Horst*, 110 Pa. St. 226. A railroad company was sued by an employee for an accident claimed to have resulted from the use of a rope instead of a chain in coupling cars which lacked a draw-head. The court in effect charged that, for this reason,

¹ *O'Shaughnessy v. Suffolk Brewing Co.*, 145 Mass. 569.

² *Osborne v. Detroit*, 32 Fed. Rep. 36.

³ *Osborne v. Detroit*, 32 Fed. Rep. 36.

⁴ *Stager v. R. R. Co.*, 119 Pa. St. 70.

⁵ *Pennsylvania R. R. Co. v. Peters*, 116 Pa. St. 206.

⁶ *Huhn v. R. R. Co.*, 92 Mo. 440.

⁷ *Larabee v. Sewall*, 66 Me. 376.

the plaintiff should recover. *Held*, error, the question being for the jury, and being, not whether a rope was not as safe as a chain, but whether it was reasonably safe: *Tabler v. R. R. Co.*, 93 Mo. 79. The driver of a wagon sued for injuries sustained from a collision with a horse-car. The evidence as to the rate of speed of the car was conflicting. Plaintiff's statements were in some respects contradictory. *Held*, that the case was for the jury, and that it would have been error to nonsuit: *North Hudson County R. R. Co. v. Isley*, 49 N. J. L. 468.

§ 1216. **Pleading.**—Among the rules of pleading which remain unchanged by the introduction of the code, and which must, from their nature, appertain to any system of pleading, are the requirements that pleadings must be certain, and that the evidence must agree with the pleadings.¹ The plaintiff may not state one act of negligence in his declaration, and recover on proof of another act.² A declaration for negligence is not supported by proof of negligent acts not specifically set out.³ It is sufficient to allege that a duty existed upon the part of the defendant, and that he violated such duty; but the facts must be stated, showing the legal liability. Unless the duty results, in all cases, from the stated facts, the declaration will be bad.⁴ Special damage must be stated with great particularity, in order that the defendant may be enabled to meet the charge if it be false; and if it be not so stated, it cannot be given in evidence.⁵ But unless it is sought to recover special damages, it is not necessary, in an action for personal injuries, that the injuries received by the plaintiff should be particularly described in the declaration. It is enough if it is shown that the plaintiff received a bodily injury.⁶ Nor need there be a

¹ 2 Thompson on Negligence, 1247.

² Chicago etc. R. R. Co. v. Bell, 112 Ill. 360.

³ Wabash etc. R. R. Co. v. Coble, 113 Ill. 115.

⁴ Toledo etc. R. R. Co. v. Weaver, 34 Ind. 298; Pittsburgh etc. R. R. Co. v. Troxell, 57 Ind. 246; Brown v. Mallett, 5 Com. B. 599; 17 L. J. Com. P.

227; Seymour v. Maddox, 16 Q. B. 326; Buffalo v. Holloway, 7 N. Y. 493; 57 Am. Dec. 550; Taylor v. Ins. Co., 2 Bosw. 106.

⁵ 1 Chitty's Pl. 414; Baldwin v. R. R. Co., 4 Gray, 333.

⁶ Corey v. Bath, 35 N. H. 530; Brown v. Byroads, 47 Ind. 435.

special averment of prospective damages, except where a father is the plaintiff, and is suing for a prospective loss of service of the son.¹ Where both actual and exemplary damages for causing death are sought, the allegations should be in the nature of two distinct counts on different causes of action.² In relying upon statutory enactments either for a cause of action or in defense, general statutes must be pleaded in general terms, while special acts should be stated by their title and date.³ The fact that the statute prescribes the signals to be given by a locomotive at a highway crossing does not require the plaintiff in an action founded on negligence to allege that these signals were not given, in order that he may show that they were not.⁴ Negligence on the part of the defendant is the gist of the action, and must be charged in the plaintiff's petition.⁵ It is not, however, absolutely necessary that it should be averred in terms, if such facts are stated as will raise a presumption of negligence.⁶ It is not necessary to set out the facts constituting the negligence complained of. An allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient.⁷ But the act the negligent doing of which caused the injury must be stated. A bare allegation that the party was negligent is too gen-

¹ *Gilligan v. R. R. Co.*, 1 E. D. Smith, 461.

² *Galveston etc. R.R. Co. v. LeGierse*, 51 Tex. 189.

³ *Shartle v. Minneapolis*, 17 Minn. 308; *Goshen etc. Co. v. Sears*, 7 Conn. 86.

⁴ *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 53.

⁵ *Wright v. R. R. Co.*, 18 Ind. 168; *Terre Haute etc. R. R. Co. v. Smith*, 19 Ind. 42; *Toledo etc. R. R. Co. v. Weaver*, 34 Ind. 298; *Jeffersonville etc. R. R. Co. v. Martin*, 10 Ind. 416; *Indianapolis etc. R.R. Co. v. Williams*, 15 Ind. 486; *Toledo etc. R. R. Co. v. Eidson*, 51 Ind. 67; *Quick v. R. R. Co.*, 31 Mo. 399; *Brown v. R.R. Co.*, 33 Mo. 309; *Dyer v. R. R. Co.*, 34 Mo. 127;

Ranson v. Labranche, 16 La. Ann. 122.

⁶ *Quick v. R. R. Co.*, 31 Mo. 399; *Brown v. R.R. Co.*, 33 Mo. 309; *Dyer v. R. R. Co.*, 34 Mo. 127; *Burdick v. Worrall*, 4 Barb. 596.

⁷ *St. Louis etc. R. R. Co. v. Mathias*, 50 Ind. 66; *Indianapolis etc. R. R. Co. v. Keely*, 23 Ind. 133; *Ohio etc. R. R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Pittsburgh etc. R. R. Co. v. Nelson*, 51 Ind. 150; *Kessler v. Leeds*, 51 Ind. 212; *Clark v. R. R. Co.*, 15 Fed. Rep. 588; *Rowland v. Murphy*, 66 Tex. 534; *Otto v. R. R. Co.*, 12 Mo. App. 168; *Mack v. R. R. Co.*, 77 Mo. 232; *Schneider v. R. R. Co.*, 75 Mo. 295; *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 553; 85 Am. Dec. 477.

eral to support any evidence.¹ The full particulars of the derailment of defendant's train on which plaintiff founds his action for personal injuries need not be set forth in the complaint.² In an action against a street cable railroad company for damages occasioned by the excessive and improper width of the grip-slot at a particular point, it is not necessary for the plaintiff to plead or prove the defendant's knowledge of the defect.³

The plaintiff need not, to entitle him to double damages under a statute, claim them in his petition.⁴ Facts, and not conclusions of law, must be stated.⁵ It does not follow, however, that because negligence is a mixed question of law and fact, a general allegation of negligence is pleading a legal conclusion only.⁶ The words "not securely fenced, as required by law," allege a fact, and not a conclusion of law.⁷ Matters strictly pertaining to the remedy may be shown in evidence without being pleaded.⁸ The complaint need not negative contributory negligence unless the other averments suggest the inference that plaintiff was guilty.⁹ The phrase "without fault" sufficiently negatives contributory negligence on the part of plaintiff.¹⁰ But an allegation that plaintiff "attempted" to do a certain thing carefully is not equivalent to the necessary allegation that he was in the exercise of due care.¹¹ In an action for an injury to a child, the complaint need not aver that the child was not guilty of negligence; it is sufficient if it is averred that the injury was inflicted without

¹ *Jeff. etc. R. R. Co. v. Dunlap*, 29 Ind. 426; *Kennedy v. Morgan*, 57 Vt. 46.

² *Louisville and Nashville R. R. Co. v. Jones*, 83 Ala. 376.

³ *Keitel v. R. R. Co.*, 28 Mo. App. 657.

⁴ *Clark v. Worthington*, 12 Pick. 571.

⁵ *Indiana etc. R. R. Co. v. Bishop*, 29 Ind. 202; *Pittsburg etc. R. R. Co. v. Keller*, 49 Ind. 211.

⁶ *Grinde v. R. R. Co.*, 42 Iowa, 376.

⁷ *Jeffersonville etc. R. R. Co. v. Chenoweth*, 30 Ind. 366; *Indianapolis etc. R. R. Co. v. Adkins*, 23 Ind. 340.

⁸ *Kent v. Lincoln*, 34 Wis. 357.

⁹ *Street R. R. Co. v. Nolthenius*, 40 Ohio St. 376; *Louisville etc. R. R. Co. v. Wolfe*, 80 Ky. 82.

¹⁰ *Rogers v. Overton*, 87 Ind. 410.

¹¹ *Thompson v. R. R. Co.*, 57 Mich. 300.

the negligence of the parents with whom the child resided.¹ A defense grounded upon contributory negligence of the plaintiff, or the fact that the injury resulted from inevitable accident, must be pleaded specially.² Evidence showing matter of excuse is not admissible under the plea of "not guilty."³

§ 1217. **Measure of Damage—Loss of Time—Incapacity to Labor—Expenses.**—If the plaintiff is, in consequence of the injury, disabled from attending to his ordinary business and occupation, he is entitled to be compensated in damages for the time so lost.⁴ The amount of the damages must, of course, depend upon the calling in which the plaintiff was engaged, the amount of money which he was able to earn, the steadiness, regularity, etc., of his employment, and evidence on these points is relevant.⁵ It is held that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are, the bodily injury sustained; the pain undergone; the effects on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent; the

¹ *Pittsburg etc. R. R. Co. v. Vining*, 27 Ind. 513; 92 Am. Dec. 269.

² *Knapp v. Salsbury*, 2 Camp. 500; *Grant v. Baker*, 12 Or. 329. *Contra*, *Gough v. Bryan*, 2 Mees. & W. 770.

³ *Hall v. Fearnley*, 3 Q. B. 919. *Contra*, *Indiana etc. R. R. Co. v. Ruth-erford*, 29 Ind. 82; 92 Am. Dec. 337.

⁴ *Rockwell v. R. R. Co.*, 64 Barb. 438; 53 N. Y. 625; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Goodno v. Oshkosh*, 28 Wis. 300; *Lombard v. Chicago*, 4 Biss. 460; *Indianapolis v. Gaston*, 58 Ind. 225; *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290; *Chicago v. O'Brennan*, 65 Ill. 160; *Morris v. R. R. Co.*, 45 Iowa, 29; *Chicago v. Jones*, 66 Ill. 349; *Chicago etc. R. R. Co. v. Wilson*, 63 Ill. 168; *Peoria Bridge Ass'n v. Loomis*, 20 Ill.

236; 71 Am. Dec. 263; *Grant v. Brooklyn*, 41 Barb. 381; *Ripon v. Bittel*, 30 Wis. 614; *Sheehan v. Edgar*, 58 N. Y. 631; *Beardsley v. Swann*, 4 McLean, 333; *Stafford v. Oskaloosa*, 64 Iowa, 251. A teacher of languages may show, on the question of damages, the number of his pupils and the amount of his earnings in the years prior to the accident: *Simonin v. R. R. Co.*, 36 Hun, 214.

⁵ *Nebraska City v. Campbell*, 2 Black, 590; *Rockwell v. R. R. Co.*, 64 Barb. 438; 53 N. Y. 625; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Kessel v. Butler*, 53 N. Y. 612; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Balt. etc. R. R. Co. v. Boteler*, 38 Md. 568.

expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, which, again, **may** be of a temporary character, or may be such as to incapacitate the party for the remainder of his life.¹ He is entitled to damages for his loss of time, without regard to the fact that his employers made no deduction from his salary.² A married woman cannot recover for loss of time unless she was doing business on her own account.³ And one cannot recover the cost of board during the time he was incapacitated;⁴ nor for his own loss of time and capacity to labor, and in addition what he has to pay another to supply that loss of labor.⁵ But where the plaintiff has been permanently disabled from pursuing his usual avocation, he is entitled to recover compensation for the injury received.⁶ Evidence tending to show permanent injury as affecting the amount of damages is properly submitted to the jury.⁷ In the

¹ *Phillips v. R. R. Co.*, L. R. 5 C. P. D. 280; *Peoria Bridge Co. v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263; *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260; *City of Chicago v. Martin*, 49 Ill. 241; 95 Am. Dec. 590; *Pennsylvania Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229; *Stafford v. Oskaloosa*, 64 Iowa, 251; *Secord v. R. R. Co.*, 18 Fed. Rep. 221; 5 McCrary, 515; *Mackoy v. R. R. Co.*, 18 Fed. Rep. 236. The plaintiff may show how much he has earned annually for the six or seven years prior thereto: *Ehrgott v. New York*, 96 N. Y. 264.

² *Missouri etc. R. R. Co. v. Jarrard*, 65 Tex. 560.

³ *Thomas v. Brooklyn*, 58 Iowa, 438. She may testify that, at the time of the accident, she was doing the housework for her husband and eight children: *Joliet v. Conway*, 119 Ill. 489.

⁴ *Graeber v. Derwin*, 43 Cal. 495.

⁵ *Blackman v. Gardiner Bridge*, 75 Me. 214.

⁶ *George v. Haverhill*, 110 Mass. 506; *New Jersey Express Co. v. Nichols*, 33

N. J. L. 435; 97 Am. Dec. 722; *Gale v. R. R. Co.*, 53 How. Pr. 389; 13 Hun, 1; *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432; *Goodno v. Oshkosh*, 28 Wis. 600; *Hammond v. Mukwa*, 40 Wis. 36; *Hall v. Fond du Lac*, 42 Wis. 274; *Wightman v. Providence*, 1 Cliff. 524; *Indianapolis v. Gaston*, 58 Ind. 225; *Collins v. Council Bluffs*, 32 Iowa, 325; 7 Am. Rep. 200; *Belair v. R. R. Co.*, 43 Iowa, 662; *Morris v. R. R. Co.*, 45 Iowa, 29; *Chicago etc. R. R. Co. v. Wilson*, 63 Ill. 167; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 236; 71 Am. Dec. 263; *Chicago v. Elzeman*, 71 Ill. 132; *Nichols v. Brunswick*, 3 Cliff. 81; *Lombard v. Chicago*, 4 Biss. 460. Where a mechanic is permanently injured by defendant's negligence, the jury may consider the probable expense to him of his future disability, although there is no proof of the amount of his past earnings: *Staal v. R. R. Co.*, 36 Hun, 208.

⁷ *Kerr v. Fargue*, 54 Ill. 482; 5 Am. Rep. 146.

case of permanent disability, the measure of damages is such an amount as will purchase an annuity equal to the interest on the difference between what the plaintiff could earn before and what he could earn after the injury, and not such a principal sum as would produce such interest.¹ So he may recover the expenses in procuring medical and surgical attendance, the cost of nursing, attendance, and the like.² So he may recover for money or valuables lost from his person at the time of the injury or in consequence thereof.³ In an action against a city to recover for injuries sustained from a defect in the street, if the injuries are permanent, the party may recover prospective as well as past damages, not exceeding the amount claimed in the complaint.⁴

ILLUSTRATIONS.—A statute gave a right of action against a town for damage "to any person, his team, carriage, or other property," caused by reason of the insufficiency or want of repair of any highway. *Held*, that a man might recover under the statute for loss of his wife's services, and the expenses of her sickness resulting from an accident caused by a defective highway: *Hunt v. Town of Winfield*, 36 Wis. 154; 17 Am. Rep. 482.

§ 1218. **Pain and Suffering—Physical and Mental.**—The physical pain and suffering to which the plaintiff is subjected as a consequence of the personal injury is an element of damage for which he is entitled to be compen-

¹ *Houston etc. R. R. Co. v. Willie*, 53 Tex. 318; 37 Am. Rep. 756.

² *Folsom v. Underhill*, 36 Vt. 581; *Morris v. R. R. Co.*, 45 Iowa, 29; *Chicago etc. R. R. Co. v. Wilson*, 63 Ill. 167; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 236; 71 Am. Dec. 263; *Chicago v. O'Brennan*, 65 Ill. 162; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Langlass*, 66 Ill. 361; *Beardsley v. Swann*, 4 McLean, 333; *Ware v. St. Paul Water Co.*, 1 Dill. 465; *Gale v. R. R. Co.*, 13 Hun, 1; *Goodno v. Oshkosh*, 28 Wis. 300. But only upon proof of their value: *Reed v. R. R. Co.*, 57 Iowa, 23. And even for gratuitous services of

this kind: *Indianapolis v. Collins*, 58 Ind. 227; *Pennsylvania R. R. Co. v. Marion*, 104 Ind. 239. Where one injured by reason of the negligence of another employs a nurse, the expense is not to be rejected as an element of damage for the reason that the person so injured has a wife and daughter: *Kendall v. Albia*, 73 Iowa, 241. A married woman can recover expenses for medical attendance: *Schulte v. Holliday*, 54 Mich. 73.

³ *Woodman v. Nottingham*, 49 N. H. 387; 6 Am. Rep. 526.

⁴ *Weisenberg v. City of Appleton*, 20 Wis. 56; 7 Am. Rep. 39.

sated.¹ This includes not only the suffering experienced before the trial, but such as is reasonably certain to result from the injury afterward.² Where a second amputation of a leg for an injury to which damages are claimed will soon be necessary, the fact is properly considered as an element of damages.³ A disease directly resulting from personal injuries received may be considered as an element of damage, although such result is unusual.⁴ Although one injured by negligence had a predisposition to disease, the measure of damages is based on his condition without regard to the fact of the predisposition.⁵ But in order that damages may be recovered for the results of a disease claimed to have been caused by a fall, it must clearly appear by reasonable inference that the fall was the actual cause of the disease.⁶ In like manner the plaintiff is entitled to recover for mental suffering resulting from the injury.⁷ And it is held that the plaintiff may recover for the fear and mental agony produced by the peril to which he is exposed at the time of the injury complained

¹ Hagan's Petition, 5 Dill. 96; Cooper v. Mullins, 30 Ga. 152; 76 Am. Dec. 638; Pennsylvania R. R. Co. v. Allen, 53 Pa. St. 276; Pittsburg etc. R. R. Co. v. Donahue, 70 Pa. St. 119; Beardsley v. Swann, 4 McLean, 333; Chicago v. Elzeman, 71 Ill. 131; Chicago v. Jones, 66 Ill. 349; Peoria Bridge Ass'n v. Loomis, 20 Ill. 236; 71 Am. Dec. 263; Rowell v. Williams, 29 Iowa, 217; Indianapolis v. Gaston, 58 Ind. 225; Collins v. Council Bluffs, 32 Iowa, 329; 7 Am. Rep. 200; Morris v. R. R. Co., 45 Iowa, 29; Mason v. Ellsworth, 32 Me. 271; Rockwell v. R. R. Co., 64 Barb. 438; Gale v. R. R. Co., 53 How. Pr. 389; 13 Hun, 1; McLaughlin v. Corry, 77 Pa. St. 109; 18 Am. Rep. 432; Goodno v. Oshkosh, 28 Wis. 300; Hammond v. Mukwa, 40 Wis. 35; Penn. etc. Canal Co. v. Graham, 63 Pa. St. 290; 3 Am. Rep. 549. Where in an action to recover for the mangling and crushing of his arm the plaintiff proves the injury and the condition of the arm, no further evidence

that he suffered pain is necessary to justify the jury in making the pain suffered an element of damage: Chicago etc. R. R. Co. v. Warner, 108 Ill. 538.

² Aaron v. R. R. Co., 2 Daly, 127.

³ Cumming v. R. R. Co., 38 Hun, 362.

⁴ Houston R. R. Co. v. Leslie, 57 Tex. 83.

⁵ Louisville etc. R. R. Co. v. Falvey, 104 Ind. 409.

⁶ Houston v. Traphagen, 47 N. J. L. 23.

⁷ Peoria Bridge Co. v. Loomis, 20 Ill. 236; 71 Am. Dec. 263; Indianapolis etc. R. R. Co. v. Stables, 62 Ill. 313; Ware v. St. Paul Water Co., 1 Dill. 465; Wright v. Compton, 53 Ind. 337; Stewart v. Ripon, 38 Wis. 587; Canning v. Williamstown, 1 Cush. 451; Pennsylvania etc. R. R. Co. v. Graham, 63 Pa. St. 290; 3 Am. Rep. 549; Porter v. R. R. Co., 71 Mo. 66; 36 Am. Rep. 454. But see Johnson v. Wells, 6 Nev. 224; 3 Am. Rep. 245.

of.¹ In an action for personal injuries, the only mental suffering that may be proved is that of the plaintiff due to the injury itself; and evidence of his anxiety about the safety of others is not admissible.²

§ 1219. **Exemplary and Punitive Damages.**—Exemplary, vindictive, or punitive damages are given in cases where the injury was willfully or wantonly inflicted, or shows such a gross want of care as to justify the presumption of willfulness or wantonness.³ Whether the case is one for exemplary damages is a question to be determined by the court.⁴ In the following cases it was held that the evidence justified exemplary damages: Where the defendant fired a pistol in shooting at a mark, and the ball struck some other object, and glanced and hit the plaintiff, and it was found that the injury was unintentional, but was the result of gross and culpable negligence on the part of the defendant;⁵ where the plaintiff was attacked by vicious dogs belonging to the defendant (who knew their dangerous character, and allowed them to run at large), and his clothing was torn and his person injured, and parcels of goods in his possession were destroyed.⁶ In the following cases it was held that the following facts

¹ *Seger v. Barkhamsted*, 22 Conn. 298; *Masters v. Warren*, 27 Conn. 294; *Oliver v. La Valle*, 36 Wis. 598; *Cooper v. Mullins*, 30 Ga. 152; 76 Am. Dec. 639; *Smith v. R. R. Co.*, 30 Minn. 169. The pain of being fastened for half an hour in the wreck of a railroad train may be considered on the question of damages: *Quinn v. R. R. Co.*, 34 Hun. 331. *Contra*, *Canning v. Williamstown*, 1 Cush. 452.

² *Keyes v. R. R. Co.*, 36 Minn. 290.

³ *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Leavenworth etc. R. R. Co. v. Rice*, 10 Kan. 426; *Jackson v. Schmidt*, 14 La. Ann. 807; *Illinois etc. R. R. Co. v. Welch*, 52 Ill. 184; *Murphy v. R. R. Co.*, 29 Conn. 496; *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55; *Emblen v. Myers*, 6 Hurl. & N. 54; *Hull v. Richmond*, 2

Wood. & M. 346; *Whipple v. Walpole*, 10 N. H. 130; *Hawes v. Knowles*, 114 Mass. 518; 19 Am. Rep. 383; *Parker v. Jenkins*, 3 Bush, 587; *Jacobs v. R. R. Co.*, 10 Bush, 263; *Peoria Bridge Co. v. Loomis*, 20 Ill. 235; 71 Am. Dec. 263. *Contra*, *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270.

⁴ *Chicago v. Martin*, 49 Ill. 241; 95 Am. Dec. 590; *Heil v. Glandring*, 42 Pa. St. 493; 82 Am. Dec. 537; *Morford v. Woodworth*, 7 Ind. 83; *Murphy v. R. R. Co.*, 29 Conn. 499; *Ware v. St. Paul Water Co.*, 1 Dill. 465; *Kountz v. Brown*, 16 B. Mon. 586; *Chiles v. Drake*, 2 Met. (Ky.) 146; 74 Am. Dec. 406.

⁵ *Welch v. Durand*, 36 Conn. 182; 4 Am. Rep. 55.

⁶ *Van Fragstein v. Windler*, 2 Mo. App. 598.

did not justify exemplary damages: In an action for injuries sustained by the negligence of the defendant's servant, the fact that he was not discharged, but was retained in the defendant's employ;¹ where the plaintiff was injured by the falling wall of a house which was in the process of being demolished, and the proprietor had constructed a barrier on the sidewalk to prevent people from passing in front of the building, but, through an error of judgment, had not made it sufficient for the purpose, and the plaintiff was injured in consequence;² where a brakeman, in the discharge of his duty, was injured by a projecting awning, although the attention of the railroad authorities had been called to its dangerous condition.³ In Illinois, it is held that a corporation cannot be made liable in exemplary damages for an injury resulting from the gross negligence of an employee.⁴ And it has been held that exemplary damages are not to be given against municipal corporations.⁵ But vindictive or exemplary damages have been sustained against municipal corporations in some cases.⁶ If the case justifies exemplary damages, and the court instructs the jury that the plaintiff is entitled to compensatory damages only, it is error, although the jury allowed exemplary damages.⁷

¹ *Edelman v. St. Louis Transfer Co.*, 3 Mo. App. 503.

² *Jackson v. Richmond*, 14 La. Ann. 806.

³ *Illinois etc. R. R. Co. v. Welch*, 52 Ill. 184; 4 Am. Rep. 593.

⁴ *Illinois etc. R. R. Co. v. Hammer*, 72 Ill. 353, the court saying: "A private corporation cannot be liable to punitive damages merely for gross negligence of its servants. If the company employs incompetent, drunken, or reckless servants, knowing them to be such, or, having employed them without such knowledge, retains them after learning the fact, or after full opportunity to learn it, the company would no doubt be liable. Or if its servants, whilst in the employment of the company, and engaged in carrying on the business of the company, should

willfully or wantonly produce injury to others, then the company would no doubt be liable to such damages. With its servants a mere omission of duty, although grossly negligent, should not be sufficient; but some intention to inflict the injury, or a reckless, wanton disregard for the safety of others should appear to warrant punitive damages."

⁵ *Chicago v. Langlaas*, 52 Ill. 256; 4 Am. Rep. 603; *Decatur v. Fisher*, 53 Ill. 407; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Kelly*, 69 Ill. 477; *Chicago v. Martin*, 49 Ill. 246; 95 Am. Dec. 590; *Woodman v. Nottingham*, 49 N. H. 387; 6 Am. Rep. 526.

⁶ *Whipple v. Walpole*, 10 N. H. 130; *Myers v. San Francisco*, 42 Cal. 215.

⁷ *Bass v. R. R. Co.*, 39 Wis. 636.

§ 1220. **Mitigation of Damages.**—Where the plaintiff has been guilty of negligence, but of such a nature as not to be a bar to the action, such negligence is sometimes allowed to be considered by the jury in mitigation of damages.¹ If one by his negligence subsequent to the accident for which he claims compensation aggravates his injuries, he is not entitled to damages for the injuries as thus aggravated.² One who, injured through another's negligence, aggravates the injury by refusing to submit to a surgical operation, proper and necessary under the circumstances, is entitled only to such damages as would have resulted had he submitted to the operation.³ The defendant cannot show in mitigation of damages that the plaintiff was insured in an accident policy, and that the money was paid to him in consequence of the injury;⁴ nor can the damages be mitigated by the fact that, after the plaintiff is injured, a charitable subscription is taken up and the money paid to him;⁵ nor will wages received by the plaintiff after the injury go to the mitigation of damages.⁶

ILLUSTRATIONS.—In an action to recover damages for an injury caused by defendant's negligence, plaintiff claimed damages for being disabled to practice his profession as a physician. *Held*, that defendant might introduce evidence as to his professional reputation, and as to the unlawfulness of his practice: *Jacques v. R. R. Co.*, 41 Conn. 61; 19 Am. Rep. 483.

§ 1221. **Amount of Damages—Verdicts Sustained.**—The amount of damages to be allowed is a question for the jury, and its discretion will not be interfered with by

¹ 2 Thompson on Negligence, 1271; citing *Matthews v. Warner's Administrator*, 29 Gratt. 578; *Gould v. McKenna*, 86 Pa. St. 297; 27 Am. Rep. 705; 6 Rep. 343; *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174; *Cary v. Day*, 36 Conn. 157. See *ante*, Contributory Negligence.

² *Owens v. R. R. Co.*, 35 Fed. Rep. 715.

³ *Gulf etc. R. R. Co. v. Coon*, 69 Tex. 730.

⁴ *Bradburn v. R. R. Co.*, L. R. 10 Ex. 1; *Harding v. Townshend*, 43 Vt. 536; 5 Am. Rep. 304.

⁵ *Norristown v. Moyer*, 67 Pa. St. 356.

⁶ *McLaughlin v. Corry*, 77 Pa. St. 109; 18 Am. Rep. 432.

the court,' except where it is clearly against the evidence, or is so inadequate or excessive as to raise the inference that the verdict was the result of passion or prejudice.²

¹ *Danville etc. R. R. Co. v. Stewart*, 2 Met. (Ky.) 122; *Kimball v. Bath*, 38 Me. 222; 61 Am. Dec. 243; *Jacobs v. Bangor*, 16 Me. 192; 33 Am. Dec. 652; *McKinley v. R. R. Co.*, 44 Iowa, 322; 24 Am. Rep. 748; *Heil v. Glanding*, 42 Pa. St. 493; 82 Am. Dec. 537.

² *Mobile etc. R. R. v. Ashcraft*, 48 Ala. 15; *Whipple v. R. R. Co.*, 11 Phila. 345; *Redwitz v. Waggaman*, 33 La. Ann. 26; *Central R. R. v. Smith*, 76 Ga. 209; 2 Am. St. Rep. 31; *Int. etc. R. R. v. Tel. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45. In *Phillips v. R. R. Co.*, L. R. 5 C. P. D. 280, 42 L. T., N. S., 6, it was said by the court that the judges have no right to differ from or overrule the verdict of the jury because they take a different view, and merely because they differ. The judges may think that if they had been the jury they would have given a little more or would have given a little less. Still, there is this rule, that the verdicts of juries in all these cases are subject, and must for the sake of justice be subject, to the careful supervision of a court of first instance, and if necessary, of a court of appeal, in this way: that if in the judgment of the court the damages given are unreasonably large, or if they are unreasonably small, then the court is bound to act upon the conclusion thus arrived at, and must send the case again to be tried. Verdicts for the following amounts have been sustained on appeal: \$700 for bruises that were cured in a few months, and for the loss of the sense of hearing, the plaintiff being a child: *Davis v. R. R. Co.*, 60 Ga. 329; \$1,000 for fracturing a woman's thigh, shortening one leg and causing her to be confined motionless for six weeks between the sand-bags: *Shea v. Reems*, 36 La. Ann. 906; \$1,000 for the fracture of her right arm at the wrist: *Chicago v. Jones*, 66 Ill. 349; \$1,500 for the fracture of her left arm, dislocation at the wrist, and bruise of her left side: *Benedict v. Fond du Lac*, 44 Wis. 495; \$1,500 for a serious injury to the leg: *Garlick v. Pella*, 53

Iowa, 641; \$1,841 for a broken leg: *Sheff v. Huntington*, 16 W. Va. 307; \$2,000 for an injury to a woman, causing a miscarriage: *Joliet v. Conway*, 17 Ill. App. 577; \$2,000 for an injury resulting in an incurable affection of the spinal cord: *Waldron v. St. Paul*, 33 Minn. 87; \$2,000 for the breaking of the hip-bone: *Westerville v. Freeman*, 66 Ind. 255; *Hayward v. Merrill*, 94 Ill. 349; \$2,750 for dislocation of the hip-joint, and fracture of one of the spinal vertebrae: *Houfe v. Fulton*, 34 Wis. 608; 17 Am. Rep. 463; \$2,900 for a dog-bite on the hip, two inches in depth, causing hip-disease superinduced by hereditary scrofula: *Fitzgerald v. Dobson*, 78 Me. 559; \$3,200 for loss of use of the arm, from a gradual wasting away of the muscles, giving her constant pain: *Ottawa v. Sweely*, 65 Ill. 434; \$3,500, where plaintiff had his arm and leg fractured, his collar-bone broken, and his spine injured: *Klutts v. R. R. Co.*, 75 Mo. 642; \$3,500 for crushing a leg of a child twelve old, so as to cause a permanent injury: *Houston etc. R. R. Co. v. Simpson*, 60 Tex. 103; \$4,000 for a compound fracture of the left arm, and a partial dislocation of the elbow, impairing the use of the arm for life: *Van Winter v. Henry County*, 61 Iowa, 684; \$4,000 for a fracture of the patella of the left knee, causing permanent disability: *Chicago v. Crooker*, 2 Ill. App. 279; \$4,000, where the table of the skull was cracked, and final palsy threatened: *Hanson v. R. R. Co.*, 62 Me. 84; 16 Am. Rep. 404; \$4,500 for the permanent disablement of the right hand: *Schultz v. R. R. Co.*, 48 Wis. 375; \$4,700 for the loss of a hand, and for other bruises: *Central R. R. Co. v. De Bray*, 71 Ga. 406; \$5,000 for an injury by which he was wholly disabled from work for nine months, and partially for life, leaving one leg shorter than the other, and causing occasional, incurable pain: *Texas etc. R. R. Co. v. McAtee*, 61 Tex. 695; \$5,000, where his three ribs were crushed, and his leg severely wounded, lameness having lasted for

Where the case is one for compensatory damages only, and it appears that the jury has given vindictive or exemplary damages, the verdict will be set aside.³

nine months, and being likely to last longer, possibly for life: *Quinn v. R. R. Co.*, 34 Hun, 331; \$5,000, where an incurable disease of the lungs resulted from the accident: *Schafer v. Gilmer*, 13 Nev. 330; \$5,000, where the plaintiff was rendered a permanent invalid: *Chicago v. Langlass*, 66 Ill. 361; \$5,000, where the use of one leg was permanently destroyed: *Hinton v. R. R. Co.*, 65 Wis. 323; \$5,000 for contusion of the scalp and chest: *Houston etc. R. R. Co. v. Boehm*, 57 Tex. 152; \$5,000 for a fracture of the thigh-bone, by which plaintiff was rendered a cripple for life: *Chicago City R. R. Co. v. Mumford*, 97 Ill. 560; \$5,000 for degeneration of the spinal cord: *Wardle v. R. R. Co.*, 35 La. Ann. 202; \$7,000, where plaintiff's thigh was broken in two places, so as to endanger his life, and he was otherwise injured: *Marion v. R. R. Co.*, 64 Iowa, 568; \$7,000, where the plaintiff's injury consisted of a fracture of the skull, bruises, a permanent injury to one eye, and a loss of memory: *Macon etc. R. R. Co. v. Winn*, 26 Ga. 250; \$7,500 for a fracture of the lower vertebræ, the injury resulting in permanent paralysis of her lower extremities: *Chicago v. Herz*, 87 Ill. 541; \$8,000 for the loss of an infant's right arm: *Schmidt v. R. R. Co.*, 23 Wis. 186; 99 Am. Dec. 158; \$8,000 in the case of an accident rendering a strong man helpless for life: *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 143; \$8,000 for injuries likely to be permanent, considerably affecting her general health, and causing pain: *Harold v. R. R. Co.*, 13 Daly, 378; \$8,000 for an injury to a person fifty-two years old, confining him to his bed nine weeks, and resulting in a permanent shortening of his leg about two and one half inches: *Funston v. R. R. Co.*, 61 Iowa, 452; \$8,958 for a permanent injury to the spine: *Ill. Cent. R. R. Co. v. Parks*, 88 Ill. 373; \$9,000, where the bone of his thigh was

crushed, and he received severe internal injuries; his sufferings were protracted and most intense; for he had to endure for seven weeks the excruciating torture of machinery and appliances used by surgeons to prevent a shortening of his limb, which, however, were unavailing: *Deppe v. R. R. Co.*, 38 Iowa, 592; and see *Campbell v. Portland Co.*, 62 Me. 552; 16 Am. Rep. 503; \$10,000 for the loss of the right arm at the wrist: *Union Pacific R. R. Co. v. Young*, 19 Kan. 488; \$10,000 for the loss of an arm: *Ketchum v. R. R. Co.*, 38 La. Ann. 777; *Robinson v. R. R. Co.*, 48 Cal. 409; \$10,000 for the loss of a leg: *Atchison etc. R. R. Co. v. Moore*, 31 Kan. 197; \$10,000 for a permanent injury from which the plaintiff will sooner or later die: *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138; 52 Am. Rep. 653; \$11,000 for the loss of a leg, and a permanent disability: *Berg v. R. R. Co.*, 50 Wis. 419; \$15,000 for a permanent injury incapacitating him from working: *Gulf etc. R. R. Co. v. Dorsey*, 66 Tex. 148; \$1,500 for an injury totally ruining the plaintiff's health: *Woodbury v. District of Columbia*, 5 Mackey, 127; \$15,000, where his right shoulder and some ribs were broken, his right arm disabled, a leg had to be amputated, and he was confined to his bed nearly six weeks: *Solen v. R. R. Co.*, 13 Nev. 106; \$15,000 for the loss of the both legs: *Barksdull v. R. R. Co.*, 23 La. Ann. 180; \$15,000 for the fracture of the thigh-bone, causing the plaintiff to be a cripple for life: *Collins v. Council Bluffs*, 32 Iowa, 326; 7 Am. Rep. 200; on a rehearing, the verdict was, however, reduced to \$10,000; \$15,695, in view of the number and severity of plaintiff's injuries, and the pain, deformity, and inability consequent upon them: *Schultz v. R. R. Co.*, 46 N. Y. Sup. Ct. 211; \$19,000, plaintiff's injuries being severe, and her sufferings great, and it being

³ *Goodno v. Oshkosh*, 28 Wis. 304; *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174; *Chicago v. Kelly*, 69 Ill.

475; *Chicago etc. R. R. Co. v. McKittrick*, 78 Ill. 619.

§ 1222. **Verdicts Set Aside as Excessive.**—Where the damages given by the jury are out of all character as compared with the injury received, the courts will set the verdict aside.¹ And the appellate court assumes jurisdic-

probable that she might never fully recover, and that her life might be materially shortened: *Groves v. Rochester*, 39 Hun, 5; \$25,000, where plaintiff, formerly a healthy man, has become an "almost total wreck, both physically and mentally": *Chicago etc. R. R. Co. v. Holland*, 18 Ill. App. 418; \$25,000 for a serious injury to the legs, causing permanent suffering: *Alberti v. R. R. Co.*, 43 Hun, 421; \$30,000, where the plaintiff, besides lesser injuries, received a concussion of the spine, causing chronic inflammation of the membranes enveloping the spinal cord; his faculties had already become impaired, and paralysis and premature death probably would result: *Harrold v. R. R. Co.*, 24 Hun, 184.

¹ *Chicago etc. R. R. Co. v. McKean*, 40 Ill. 218; *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 497, the court saying: "\$18,000 is so large a sum that we regard it excessive. That amount, put at interest at the highest legal rate, would produce annually \$1,800,—more, by a large sum, than is obtained by the most skillful mechanics for their labor, while appellee, in pursuit of his calling as a brakeman, could probably not have received more than one third of that sum. It is true that appellee has received a grievous injury, and has been rendered almost unfitted for business; but the railroad company should not be required to render to him a sum which would produce a greater income than he could have earned had he not been injured. . . . But we can see that, after deducting physicians' bills, loss of time, and other expenses, including counsel fees, the sum left would, at interest, produce a sum largely above any amount he could have expected to earn had he not been disabled. This verdict seems to have been the result of passion or prejudice, and not of calm and dispassionate reflection. The finding must be in proportion to the injury sustained; and when it is

greatly excessive, as it is in this case, it will be set aside." The following verdicts have been set aside as excessive: \$1,525 for the sprain of an ankle: *Chicago etc. R. R. Co. v. Dunn*, 52 Ill. 451; 4 Am. Rep. 606; \$2,500 for an injury to the leg of a young woman; three years after the accident she had not fully recovered, yet walked naturally and gracefully; recovery had been impeded by her poor health at and before the time; the leg, although smaller than the other, was probably not permanently injured; she had not suffered any extreme pain; and the accident had not deprived her of any business or calling by which to earn money: *Chicago etc. R. R. Co. v. Puzant*, 87 Ill. 125; \$3,000 for an injury to a servant girl, which did not prevent her from working: *Decatur v. Fisher*, 53 Ill. 407; \$4,000 for a broken leg, the court reducing it to \$2,500: *Lombard v. R. R. Co.*, 47 Iowa, 494; \$4,500 for the fracture of an arm: *Chicago etc. R. R. Co. v. Hughes*, 87 Ill. 94; \$5,000 for a deformity of the right hand: *Union etc. R. R. Co. v. Hand*, 7 Kan. 380; \$5,000 for a temporary loss of sight in one eye: *Tinney v. New Jersey etc. Co.*, 5 Lans. 507; 12 Abb. Pr., N. S., 1; \$5,000 for an injury causing slight lameness: *Chicago etc. R. R. Co. v. McCara*, 52 Ill. 296; \$6,000 for injuries not permanent, received by a woman: *Langley v. R. R. Co.*, 48 N. Y. Sup. Ct. 542; \$6,500 for the loss of a thumb and forefinger: *Kansas etc. R. R. Co. v. Peavey*, 34 Kan. 472; 29 Kan. 169; 44 Am. Rep. 630; \$6,600 for the fracture of the arm of a child five years old, which will remain permanently disfigured, the court reducing it to \$3,000: *Ryder v. New York*, 50 N. Y. Sup. Ct. 220; \$9,250 for the concussion of the spinal cord, producing a deceased condition of the nervous system, but no laceration of the body or fracture of the bones, and at the time of bringing the action plaintiff was most of the time free from pain, and able to engage in

tion frequently to reduce a verdict which it thinks too large.¹

business: *Sioux City etc. R. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724; \$10,000 for a chronic inflammation of the knee-joint, plaintiff's powers of locomotion not being permanently impaired or his capacity to pursue his trade seriously affected: *Jennings v. Van Schaick*, 13 Daly, 7; \$10,000, where the plaintiff was confined to his house for several months from the injury, which caused a shortening of the leg two inches: *Chicago etc. R. R. Co. v. Haviland*, 12 Ill. App. 561; \$14,800 for the breaking of his leg by a brakeman: *Southwestern R. R. Co. v. Singleton*, 66 Ga. 252; \$18,000 for the loss of both legs by a brakeman: *Chicago etc. R. R. Co. v. Jackson*, 55 Ill. 497, *supra*; \$20,000 for the loss of a foot, the court reducing it to \$10,000; *Kennon v. Gilmer*, 5 Mont. 257; 51 Am. Rep. 45.

¹ *Collins v. Council Bluffs*, 35 Iowa, 432; 7 Am. Rep. 200; *Rose v. R. R. Co.*, 39 Iowa, 246; *McKinley v. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174; *Benagam v. Plasan*, 15 La. Ann. 703; *Kavanaugh v. Janesville*, 24 Wis. 620; *Diblin v. Murphy*, 3 Sandf. 21, the court saying: "We are satisfied that the verdict ought to have been considerably less;

and the amount is so much more than it should have been as to indicate either passion or prejudice on the part of the jury. It is a case, therefore, where we feel compelled to interfere with the verdict, and to set it aside as excessive, unless some other remedy may be adopted. Then what is proper to be done? We have considered it, and find no objection in principle to reducing the verdict to an amount such as, if the jury had found it as damages, we would not interfere with their conclusion. That is, in effect, for the court to say to the plaintiff: If you will enter a *remittitur*, so as to reduce the verdict to such a sum as we think would not have been unreasonable if it had been found by the jury, we will not set it aside. This practice is very common in actions upon contract, where the party has recovered more than he is entitled to. The only doubt is, whether in actions of tort the court can adopt the same practice. We see no objection to it in principle, and it will often relieve the parties from the expense and delay of a new trial." *Contra*, *Gale v. R. R. Co.*, 53 How. Pr. 391. The verdict may be increased on appeal: *Sullivan v. R. R. Co.*, 39 La. Ann. 800; 4 Am. St. Rep. 239.

TITLE XV.

SLANDER AND LIBEL.

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CHAPTER LXIV.

DEFAMATION IN GENERAL.

- § 1223. Defamation — When defamatory words actionable.
- § 1224. Intent immaterial — Party presumed to intend consequences — Mistake.
- § 1225. Freedom of the press — Censorship abolished.
- § 1226. Injunction will not lie to restrain publication of libel.
- § 1227. Comment and criticism on public matters.
- § 1228. What are “public matters.”
- § 1229. National and state matters.
- § 1230. Administration of justice.
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- § 1237. Who liable — All parties instrumental in publication liable.
- § 1238. Newspapers.
- § 1239. Repetition of libel — Who liable.
- § 1240. Slander.
- § 1241. Construction of defamatory words.
- § 1242. The innuendo — The colloquium.
- § 1243. Certainty as to charge — Proof.
- § 1244. Certainty as to person defamed — Who may sue.

§ 1223. Defamation — When Defamatory Words Actionable. — Defamation is a false publication regarding another to the injury of his reputation. Every man has a right to his good name. He has a right to be protected from defamation as much as from assault to his person,

or trespass against his property.¹ Hence all words, whether oral or written, which injure the reputation of another are actionable.² "The injury to the reputation is the gist of the action, and wherever that is clear, there is no need to inquire whether there is any injury to the pocket as well. But where it is by no means clear from the words themselves that they must have injured the plaintiff's reputation, there the court requires proof of some special damage to show that as a matter of fact the words have in this case impaired the plaintiff's good name."³ Proof of this kind is required more frequently in actions of slander than of libel. Words which are merely uncivil, words of idle abuse, are no ground for an action, unless it can be shown that in fact some appreciable damage to the plaintiff has followed from their use. All defamatory words, therefore, are not actionable. Words which merely might tend to produce injury to the reputation of another are not defamatory, and even though false are not actionable, unless as a matter of fact some appreciable injury has followed from their use. On the other hand, words which on the face of them must be injurious to the reputation of the person to whom they refer are clearly defamatory, and if false, are actionable, without proof that any particular damage has followed from their use.⁴

The fact that the words have injured the plaintiff's reputation will be either presumed, or must be proved. The fact will be presumed in four cases: 1. If the words, being written and published, or printed and published, are in any way disparaging to the plaintiff, or tend to bring him into ridicule and contempt; 2. If the words, being spoken, charge the plaintiff with the commission of some indictable offense; 3. If the words, being spoken, impute to the plaintiff a contagious disorder tending to exclude

¹ "His reputation is his property, and if possible, more valuable than other property": *Dixon v. Holden*, L. R. 7 Eq. 492.

² *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420.

³ *Odgers on Libel and Slander*, 17.

⁴ *Odgers on Libel and Slander*, 1.

him from society; 4. If the words, being spoken, are spoken of the plaintiff in the way of his calling or occupation, or disparage him in any public office which he may be holding. In these cases the words are said to be actionable *per se*, because it is presumed that they must have injured the plaintiff's reputation. But in all other cases of spoken words the fact that the plaintiff's reputation was injured must be proved by showing their injurious consequences or effect. Such evidence is called evidence of special damage.

The action of slander is transitory, and may be brought in one state for words spoken in another.¹

§ 1224. Intent Immaterial — Party Presumed to Intend Consequences — Mistake. — The intent or motive with which the words were used is as a rule irrelevant. If the defendant has injured the plaintiff's reputation he is liable, though he did not intend that his words should have this effect. He is presumed to have intended the natural consequence of his acts, and it is no defense (though it may go in mitigation of damages) that he had no thought of injuring the plaintiff, or hoped he would not be injured by the publication. Hence, though the complaint generally alleges that the words were spoken or published falsely and maliciously, malice in fact need never be proved at the trial; the words are actionable, if false and defamatory, although spoken or published accidentally or inadvertently, or with an honest belief in their truth, unless they were privileged.² The intent is

¹ *Offutt v. Earlywine*, 4 Blackf. 460; 32 Am. Dec. 40. Where the plaintiff brought at one time, and against the same defendants, a separate action in each of the counties of the state for one and the same libel, which was published in the county in which all the parties resided, the defendant's motion to consolidate the actions into

one was granted: *Percy v. Seward*, 6 Abb. Pr. 326.

² *Odgers on Libel and Slander*, 5. See *post*, sec. 1301, Proof of Malice. *Smart v. Blanchard*, 42 N. H. 137; *Lick v. Owen*, 47 Cal. 252; *Wilson v. Noonan*, 35 Wis. 321; *Curtis v. Mussey*, 6 Gray, 261.

inferred from the fact that the charge is false.¹ It is no defense that a publication was merely "in jest."² In an English case the plaintiff told a laughable story against himself in company; the defendant published it in the newspaper to amuse his readers, assuming that the plaintiff would not object. The plaintiff recovered damages.³ Drunkenness or an unaccepted apology is not a defense.⁴ So mistake is no defense. If a man deliver by mistake a paper out of his study, where he has just written it, he will, it seems, be liable to an action, if the paper prove libelous, although he never intended to publish that paper, but another innocent one.⁵ In one case a barrister, editing a book on the law of attorneys, referred to a case, *In re Blake*, reported in 30 L. J. Q. B. 32, and stated that Mr. Blake was struck off the rolls for misconduct. He was in fact only suspended for two years, as appeared from the Law Journal report. The publishers were held liable for this carelessness, although neither they nor the writer bore Mr. Blake any malice.⁶

ILLUSTRATIONS. — The printers of a newspaper, by a mistake, placed the name of the plaintiff's firm under the heading "First meetings under the bankruptcy act" instead of under "Dissolutions of partnership." An ample apology was inserted in the next issue; no damage was proved to have followed to the plaintiff; and there was no suggestion of any malice. In an action for libel against the proprietors of the paper, the jury awarded the plaintiff fifty pounds damages. *Held*, that the publication was libelous: *Shepherd v. Whitaker*, L. R. 10 Com. P. 502; 32 L. T. 402.

§ 1225. Freedom of the Press — Censorship Abolished.

— Both the federal and the state constitutions recognize and maintain the right of freedom of speech. By the

¹ *Holt v. Parsons*, 23 Tex. 9; 76 Am. Dec. 49.

² *Hatch v. Potter*, 2 Gilm. 725; 43 Am. Dec. 88; *Hosley v. Brooks*, 20 Ill. 115; 71 Am. Dec. 252.

³ *Cook v. Ward*, 6 Bing. 409; 4 Moore & P. 99.

⁴ *Williams v. McManus*, 38 La. Ann. 161; 58 Am. Rep. 171.

⁵ Note to *Mayne v. Fletcher*, 4 Moody & R. 312; *R. v. Paine*, 5 Mod. 167.

⁶ *Blake v. Stevens*, 4 Fost. & F. 232; 11 L. T. 543.

constitutions of twenty-eight states every man is given the right to write, speak, and publish his opinions on all subjects, being responsible for the use of that privilege.¹ In the constitutions of eighteen states, it is provided that no law abridging or restraining the freedom of the press or of speech shall ever be passed.² Eight declare that liberty of the press ought to be maintained, and that no law shall abridge that right.³ In the United States, then, all persons are exempt from censorship;⁴ they may publish what they think fit, being responsible only for the abuse of that right.⁵

§ 1226. Injunction will not Lie to Restrain Publication of Libel.—An injunction will not be granted to prohibit the publication or republication of any libel or to prevent its sale.⁶ In England it is held that libel or

¹ See 1 Stimson's Statute Law, 12.

² See 1 Stimson's Statute Law, 12.

³ See 1 Stimson's Statute Law, 12.

⁴ An interesting sketch of the history of the censorship of the printing-press in England is given by Mr. Odgers in his Digest of the Law of Libel and Slander, 10-12.

⁵ Story on the Constitution, 1889; Cooley on Constitutional Limitations, 420. "The liberty of the press," says Lord Mansfield, in *R. v. Dean of St. Asaph*, 3 Term Rep. 431, note, "consists in printing without any previous license, subject to the consequences of law." Lord Ellenborough says, in *R. v. Cobbett*, 29 How. St. Tr. 49: "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary; but if a man publish a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal." Lord Kenyon says, in *R. v. Cuthell*, 27 How. St. Tr. 675: "A man may publish anything which twelve of his countrymen think is not blamable."

⁶ *Roach v. Read*, 2 Atk. 469; *Clark v. Freeman*, 11 Beav. 112; *Brandreth v. Lance*, 8 Faigé, 23; 34 Am. Dec.

368; *Maugher v. Dick*, 55 How. Pr. 132; *Anon.*, 2 Atk. 469; *Gee v. Pritchard*, 2 Swanst. 402, 426; *Martin v. Wright*, 6 Sim. 297; *Seeley v. Fisher*, 11 Sim. 581; *Clark v. Freeman*, 11 Beav. 112; *Southey v. Sherwood*, 2 Mer. 435; *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297; *Prudential Ins. Co. v. Knott*, L. R. 10 Ch. 142 (overruling *Dixon v. Holden*, L. R. 7 Eq. 488, and *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551); *Murray v. Benbow*, *Jacob*, 474, note; *Perceval v. Phipps*, 2 Ves. & B. 19; *Mulkern v. Ward*, L. R. 13 Eq. 619; *Lawrence v. Smith*, *Jacob*, 471; *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70; 15 Am. Rep. 674; *Wetmore v. Scovell*, 3 Edw. Ch. 515; *N. Y. etc. Guardian Soc. v. Roosevelt*, 7 Daly, 188; *Life Ass'n v. Boogher*, 3 Mo. App. 179, the court saying: "In Missouri, where we are expressly forbidden by the constitution to assume the power we are asked by the plaintiff to exercise, our answer cannot be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared 'that every person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty.' If

no libel is a question for a jury; but after they have once decided it, the judge may, if he is of opinion that any repetition of the libel would be injurious to the plaintiff's property, grant an injunction restraining any repetition thereof.¹ And in a recent case an oral slander of business was enjoined, and where a defendant, who had been in the employ of the plaintiffs, had been making statements to the plaintiffs' customers injurious to their business, and trying to interfere with their customers making payments to them, an interlocutory injunction was granted restraining him from doing so.² But it has been held in Massachusetts that the jurisdiction of a court of equity does not extend to cases of libel, or of slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract.³ In Georgia two sewing-machine companies competed for a prize offered for the best sewing-machine, and it was awarded to one of them; but the other caused to be published in the newspapers false statements that the prize had been awarded to it. It was held that an injunction would not be granted to restrain such publication.⁴

it be said that the right to speak, write, or print, thus secured to every one, cannot be construed to mean a license to wantonly injure, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is, that we have no power to suspend that right for a moment or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right, except by the fear of the penalty, civil or criminal, which may wait on its abuse. The general assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. Courts of justice can only administer the

laws of the state, and of course can do nothing by way of judicial sentence which the general assembly has no power to sanction."

¹ *Saxby v. Easterbrook*, L. R. 3 C. P. D. 339; 27 Week. Rep. 188; *Thorley's Cattle Food Co. v. Massam*, 28 Week. Rep. 295; 41 L. T. 542; 14 Ch. D. 763; 28 Week. Rep. 966; 42 L. T. 851; *Thomas v. Williams*, 14 Ch. D. 864; 49 L. J. Ch. 605; 28 Week. Rep. 983; 43 L. T. 91.

² *Loog v. Bean*, 41 L. T., N. S., 188; 20 Cent. L. J. 13.

³ *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310.

⁴ *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70; 15 Am. Rep. 674.

§ 1227. **Comment and Criticism on Public Matters.** —

On matters of public interest and concern every one has a right to make such comments and criticisms as he pleases, provided he does so fairly and with an honest purpose.¹ On everything which invites public attention every one of the public has a right to express his opinion, favorable or unfavorable, as the case may be. And there is no distinction between a journalist and any other person in this regard.² But it is essential that the matter shall be a "public" one, and that the criticism shall be directed to the acts of the person, and not to the individual himself. And dishonorable motives must not be imputed, unless on good grounds, and for justifiable ends. And lastly, the critic must not take advantage of the occasion to gratify his own private malice.³ In criticising the conduct of a public officer, the publishers of a newspaper

¹ *Wason v. Walter*, L. R. 4 Q. B. 93; *Campbell v. Spottiswoode*, 3 Best & S. 769. A false and injurious publication made in a newspaper, "for sensation and increase of circulation," is malicious: *Maclean v. Scripps*, 52 Mich. 214.

² "It is not and cannot be claimed that there is any privilege in journalism which would excuse a newspaper when any other publication of libels would not be excused. Whatever functions the journalist performs are assumed and laid down at his will, and performed under the same responsibility attaching to all other persons. The greater extent of circulation makes his libels more damaging, and imposes special duties as to care to prevent the risk of such mischief, proportioned to the peril. But whatever may be the measure of damages, there is no difference in liability to suit": *Campbell, C. J.*, in *Foster v. Scripps*, 39 Mich. 376; 33 Am. Rep. 403; *Barnes v. Campbell*, 59 N. H. 128; 47 Am. Rep. 183.

³ *Campbell v. Spottiswoode*, 3 Best & S. 776; *Banner Pub. Co. v. State*, 16 Lea, 176; 57 Am. Rep. 214; *Com. v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214; *Snyder v. Fulton*, 34 Md. 128; 6

Am. Rep. 314. In *Campbell v. Spottiswoode*, 3 Best & S. 776, *Cockburn, C. J.*, said: "A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated. One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation. . . . I think the fair position in which the law may be settled is this: That where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

render themselves liable to an action for false and groundless imputations of wicked motives, or of crime.' It is not privileged to falsely charge a candidate for a public office with the commission of a crime,² or that he is under indictment for a felony;³ or to publish of a member of Congress, "he is a fawning sycophant, a misrepresentative in Congress, and a groveling office-seeker; he has abandoned his post in Congress in pursuit of an office."⁴

§ 1228. **What are "Public Matters."**—As to what are "public matters," within the meaning of the rules laid down in the last section, it may be said generally that all political and legal and ecclesiastical matters are matters of public interest and concern, and this extends to such matters, whether national, state, or local.⁵ So the public conduct of every public man is a matter of public interest,⁶ and so is that of any individual in private station who puts himself before the public for any purpose.⁷ Therefore, within this phrase fall all affairs of the state and nation, the county, the city, or the ward; all public institutions of every kind; all officials of every kind; all candidates for public office; all elections to public office; all churches; all courts and other tribunals; all public works, books, pictures, works of art, theaters, concerts, and public performances of every sort; and all mat-

¹ *Neeb v. Hope*, 111 Pa. St. 145; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84.

² *Bronson v. Bruce*, 59 Mich. 467; 60 Am. Rep. 307.

³ *Jones v. Townshend*, 21 Fla. 431; 58 Am. Rep. 676.

⁴ *Thomas v. Crowell*, 7 Johns. 264; 5 Am. Dec. 269.

⁵ *Purcell v. Sowler*, L. R. 2 C. P. Div. 218.

⁶ A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, are all subjects of public discussion. Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary,

though unpleasant, appendage to his office: *Bramwell, B.*, in *Kelly v. Sherlock*, L. R. 1 Q. B. 689. As said by Cockburn, C. J., in *Seymour v. Butterworth*, 3 Fost. & F. 376, those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties.

⁷ See *post*, § 1235.

ters which, even for a short time, claim the attention of the people and the public press.

§ 1229. **National and State Matters.** — The conduct of all public servants, the policy of the government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Congress or a state legislature, the adjustment and collection of taxes, and all other matters which touch the public welfare, are clearly matters of public interest, which come within the preceding rule.¹ Thus within this phrase have been held to fall: Presentations of petitions to the legislative power;² evidence taken before a legislative committee or commission;³ the personal character and fitness for public office of a candidate;⁴ corrupt practices at an election;⁵ the appointment or election of persons to public offices.⁶ The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is, that the criticism be *bona fide*. But as respects his person, there is no such large privilege of criticism, though he be such candidate; whatever imputes to him a crime or moral delinquency is not a privileged communication, either absolute or conditional, but is *per se* actionable.⁷ Thus a publication concerning a candidate for an elective office which charges that he bartered a public improvement in which his constituency were interested for a charter of a bank to himself and his associates, and

¹ *R. v. Dennie*, 4 Yeates, 267; 2 Am. Dec. 402.

² *Dunne v. Anderson*, 3 Bing. 88; *Wason v. Walter*, L. R. 4 Q. B. 73.

³ *Mulkern v. Ward*, L. R. 13 Eq. 622; *Hedley v. Barlow*, 4 Fost. & F. 224.

⁴ *Express Printing Co. v. Copeland*, 64 Tex. 354. To say of a candidate for Congress that his mind was weak, and never could be depended upon, is not actionable *per se*: *Mayrant v. Richardson*, 1 Nott & McC. 347; 9 Am. Dec. 707.

⁵ *Wilson v. Reed*, 2 Fost. & F. 149.

⁶ *Seymour v. Butterworth*, 3 Fost. & F. 372; *Turnbull v. Bird*, 2 Fost. & F. 508; *Lewis v. Few*, 5 Johns. 1; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Hunt v. Bennett*, 4 E. D. Smith, 647; 19 N. Y. 173; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Mayrant v. Richardson*, 1 Nott & McC. 348; 9 Am. Dec. 707.

⁷ *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757.

that, if elected, he would be an unfaithful representative; that he would by criminal indifference or treachery retard or prevent the construction of such improvement, in order to accomplish selfish, sinister, and dishonest purposes,—is not privileged.¹ So although to charge a candidate for a popular office with being uneducated, lazy, idle, and ignorant, is not libelous, nor is it libelous *per se* to charge him with being “a social leper” who should be “deodorized,” it is otherwise to charge him with being a professional gambler, bully, thief, and whoremaster;² and charges against the private character of a person holding an elective office, published more than a year before the occurrence of the next election, are not *prima facie* privileged, though he had not disclaimed his intention to be a candidate for re-election.³

ILLUSTRATIONS. — A, during a political campaign, published a letter, with the purpose of proving that a candidate for governor had procured his nomination by improper practices. D and C published an article in their newspaper, alluding to the letter as “that remarkable letter of A giving his so-called reasons for falsely asserting that Mr. L.’s nomination was secured by corrupt means.” *Held*, that the defendants’ article did not impute willful mistatement of a fact to plaintiff, but that it amounted to no more than the assertion that plaintiff’s conclusions in said letter were erroneous, and hence was not libelous: *Walker v. Hawley*, 56 Conn. 559.

§ 1230. **Administration of Justice.** — The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment.⁴ It is privileged to call public attention to the act of a judicial officer in ordering a person into confine-

¹ *Powers v. Dubois*, 17 Wend. 63.

² *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757.

³ *Commonwealth v. Wardwell*, 136 Mass. 164.

⁴ “Every one has a right to discuss fairly and *bona fide* the administration of justice as evidenced at this trial. It is open to him to show that error was committed on the part of the

judge or jury; nay, further, for myself I will say that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption”: *Fitzgerald, J., in R. v. Sullivan*, 11 Cox C. C. 57.

ment without a charge against him, or in requiring bail in an amount which, considering the prisoner's probable means and position in life, he is unable to pay.¹ But this privilege does not arise until the trial is over. Comment pending the trial is a contempt,² though a simple daily report of legal proceedings in a lengthy case is not.³ And fair comment is allowable on the evidence given by a particular witness on a trial.⁴ But it is not a "fair comment" to charge that a prisoner, though acquitted, was really guilty,⁵ or that a particular witness committed perjury.⁶

§ 1231. **Local Government.** — The management of local affairs by local authorities, as town or city councils, or other municipal boards, school boards, boards of health, of police, of public works, are matters of public, though of mere local, concern.

§ 1232. **Public Institutions.** — The working of all public institutions, such as colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by taxation, or belong to the state or national government.

§ 1233. **Ecclesiastical Matters.** — In England, a bishop's government of his diocese, a rector's of his parish, and the manner in which worship is celebrated in the established church, are matters of public interest.⁷

§ 1234. **Literary and Artistic Criticism.** — Fair and honest criticism, however severe in its terms, on any pub-

¹ *Miner v. Detroit Post and Tribune Co.*, 49 Mich. 358. 605; *Risk v. Whitehurst*, 18 L. T., N. S., 615.

² *Daw v. Ely*, L. R. 7 Eq. 49.

³ *Lewis v. Levy*, El. B. & E. 537.

⁴ *Hedley v. Barlow*, 4 Fost. & F. 224.

⁵ *Lewis v. Walter*, 4 Barn. & Ald.

⁶ *Roberts v. Brown*, 10 Bing. 519; *Stile v. Nokes*, 7 East, 493; *Littler v. Thomson*, 2 Beav. 129; *Felkin v. Herbert*, 33 L. J. Ch. 294.

⁷ *Odgers on Libel and Slander*, 47.

lished book is privileged.¹ So the criticism of all public exhibitions, theatrical or musical performances, public balls, shows, etc., is privileged.² Fair and reasonable comments, however severe in terms, may be published in a newspaper concerning anything which is made by its owner a subject of public exhibition, and are privileged communications, for which no action will lie without proof of actual malice.³ So to criticise a painting publicly exhibited, or the architecture of any public building, however strong the terms of censure used may be, is privileged.⁴ But the private character of the author, artist, or exhibitor is not public property, and the critic must not make his assault on the work a pretext for a personal attack, nor is the author, artist, or exhibitor himself, or his private character, open to ridicule.⁵ And the privilege extends only to matters of opinion. As to matters of fact the critic is liable for making a false charge.⁶

§ 1235. **Other Public Matters.**—Where a professional man advertises a new mode of treatment or medicine; where a manufacturer or dealer advertises his wares; where a man publishes in the newspaper, or in any other way, criticisms on public affairs or charges against individuals, —the press or the public may notice such matters, and they become “public” within the privilege of the foregoing

¹ “A man who publishes a book challenges criticism”: *Strauss v. Francis*, 4 Fost. & F. 1114; *Soane v. Knight*, Moody & M. 74; *Hibbs v. Wilkinson*, 1 Fost. & F. 610; *Tabart v. Tipper*, 1 Camp. 351; *Cooper v. Stone*, 24 Wend. 442; *Reede v. Sweetzer*, 6 Abb. Pr., N. S., 9; *Ryan v. Wood*, 4 Fost. & F. 755. See article on “The limits of literary and artistic criticism,” in *Southern Law Review* for September, 1883.

² *Dibdin v. Swan*, 1 Esp. 28; *Green v. Chapman*, 5 Scott, 340; *Eastwood v. Holmes*, 1 Fost. & F. 347; *Fry*

v. Bennett, 3 Bosw. 209; 28 N. Y. 330.

³ *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

⁴ *Soane v. Knight*, Mees. & M. 74; *Thompson v. Shockell*, Mcs. & M. 187.

⁵ *Thompson v. Shockell*, Mees. & M. 187; *Soane v. Knight*, Mees. & M. 74; *Strauss v. Francis*, 4 Fost. & F. 1107; *Cooper v. Stone*, 24 Wend. 442; *Reede v. Sweetzer*, 6 Abb. Pr., N. S., 9.

⁶ *Fry v. Bennett*, 3 Bosw. 209; 28 N. Y. 330.

sections.¹ So wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newspaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and denounced.² So a free criticism of the charter of an insurance company, or of any other corporation which claims the confidence of the public and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security.³ So when a man comes prominently forward in any way, and acquires for a time a *quasi* public position, he cannot escape the necessary consequence of his prominence.⁴ But where the defendant, in answering a letter which the plaintiff has sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents and indulging in other uncalled for personalities, he will be held liable.⁵ In discussing the subject of a scheme or plan for making a railroad by the consolidation of certain short lines, and to obtain control of a certain railroad company by electing directors favorable to the scheme, a public speaker or writer has the qualified privilege which attaches to public affairs. The distinction between the public and private affairs of a railroad is this: When a railroad is to be built, or a company to be chartered, the question whether it shall be authorized is a public one; but when the company is organized and the

¹ Odgers on Libel and Slander, 50; Hunter v. Sharpe, 4 Fost. & F. 983; Paris v. Levy, 9 Com. B., N. S., 342; Bigney v. Van Benthuyssen, 36 La. Ann. 38; Com. v. Batchelder, Thach. C. C. 191.

² Odger v. Mortimer, 28 L. T. 472; König v. Ritchie, 3 Fost. & F. 413; R. v. Veley, 4 Fost. & F. 1117; Hibbs v. Wilkinson, 1 Fost. & F. 608; O'Don-

oghue v. Hussey, 5 Ir. Rep. C. L. 124; Dwyer v. Esmonde, 2 L. Rep. Ir. 243; Davis v. Duncan, L. R. 9 Com. P. 396.

³ Hahnemannian L. Ins. Co. v. Beebe, 48 Ill. 87; 95 Am. Dec. 519.

⁴ Odgers on Libel and Slander, 51.

⁵ Murphy v. Halpin, 8 Ir. Rep. C. L. 127.

stock issued, anything which merely affects the value of the stock is private.¹

But private persons cannot be the subject of ill-natured remarks in the public press, where they have done nothing to expose themselves to public censure.² The trustee of a mining corporation is not such a public officer as to render the incumbent amenable to criticism through newspapers, as in case of persons filling public offices of trust and confidence, in the proper administration of which the community has an interest.³ Nor is a city physician, appointed by the city council, and not elected by the people.⁴

ILLUSTRATION.—The plaintiff held himself out as teacher of stenography, etc., and sought to attract pupils to his place by signs and advertisements. *Held*, that he thus assumed a *quasi* public character, and that a newspaper report of an interview with him concerning his business must be shown to be malicious in fact before it would be libelous: *Press Co. v. Stewart*, 119 Pa. St. 584.

§ 1236. **Publication.**—Defamatory words are not actionable until they are published, and by publication is meant the putting of the slander before one or more persons other than the plaintiff. To slander a person to his face is not actionable, unless some one overhears it; nor is it to send an inclosed letter containing defamatory matter to the plaintiff;⁵ nor is it a publication to speak

¹ *Crane v. Waters*, U. S. C. C. Mass., 1882; and see *Hahnemannian L. Ins. Co. v. Beebe*, 48 Ill. 87; 95 Am. Dec. 519.

² See *ante*, § 1227; *O'Connor v. Sill*, 60 Mich. 175.

³ *Wilson v. Fitch*, 41 Cal. 363.

⁴ *Foster v. Scripps*, 39 Mich. 376; 33 Am. Rep. 403, the court saying: "Where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, we have found no authority, and we think there is no reason, for holding any libel privileged except a *bona fide* representation made without malice to the proper au-

thority, complaining on reasonable grounds."

⁵ *Cooley on Torts*, 193; *Lyle v. Clason*, 1 Caines, 581; *Spaits v. Poundstone*, 87 Ind. 522; 44 Am. Rep. 773; *McIntosh v. Matherly*, 9 B. Mon. 119; *Broderick v. James*, 3 Daly, 481; *Desmond v. Brown*, 33 Iowa, 13. *Aliter* where one is prosecuted criminally, and not sued. In *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 104, a proprietor of a newspaper cannot be found to have "published" a libel, unless it is proved to have been read as well as printed and sold: *Prescott v. Tousey*, 50 N. Y. Sup. Ct. 12.

them to the person defamed, even though the place is a public one, if no other person hears them.¹ But to constitute publication, the libel need not be made known to the public generally. It is enough if it be made known to a single third person.² It is no publication of a slander to speak it in a foreign language which no one present understands.³ But this rule does not apply to a libel printed in a foreign language.⁴ The moral or intellectual character of the person in whose hearing words are spoken is immaterial.⁵

And the publication must be made by the defendant. If the party to whom the slanderous words are spoken or the written libel is sent, being the one defamed, gives it to the world, the defendant is not responsible.⁶ But the words are actionable, although spoken, when no one else is present, to one who knows them to be false, and who does not repeat them until after action brought,⁷ and an injunction of secrecy by the defendant to the witness is no defense.⁸

To have a libelous writing in one's possession is no publication;⁹ neither is it to post up a libelous placard, if it is taken down before any one sees it.¹⁰ A defamatory writing is no libel so long as it remains in the possession of the composer, and is seen by no one else; but if he keeps such a paper in his possession, he must, at his peril, see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong, and was the means of its becoming injurious.¹¹ It is a publication to deliver it to a person

¹ *Sheffill v. Van Deusen*, 13 Gray, 304; 74 Am. Dec. 632.

² *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

³ *Krene v. Ruff*, 7 Iowa, 482.

⁴ *Palmer v. Harris*, 60 Pa. St. 156; 100 Am. Dec. 557; *Mielenz v. Quasdorf*, 68 Iowa, 726; *K. v. H.*, 20 Wis. 239; 91 Am. Dec. 397.

⁵ *Sheffill v. Van Deusen*, 15 Gray, 485; 77 Am. Dec. 377.

⁶ *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556.

⁷ *Marble v. Chapin*, 132 Mass. 225.

⁸ *McGowan v. Manifee*, 7 T. B. Mon. 314; 18 Am. Dec. 178.

⁹ *Odgers on Libel and Slander*, 152.

¹⁰ *Odgers on Libel and Slander*, 152.

¹¹ *Cooley on Torts*, 281. But Mr. Odgers says (*Slander and Libel*, 152): "If I compose or copy a libel, and keep the manuscript in my study, in-

who would necessarily read it, even though it is not proved that in the particular case he did read it, as delivering a newspaper to a revenue commissioner to stamp it,¹ or a manuscript to a printer,² or to send a libel by telegraph,³ or by postal card.⁴ Where, however, though a third person may have had an opportunity of reading the libel, if he actually did not, it is no publication.⁵ It is no publication by one who picks up and delivers a sealed letter, the contents of which are unknown to him.⁶ So where a person wrote a letter and gave it to another to deliver, folded, but not sealed, and the messenger delivered it to the plaintiff without reading it, it was held no publication.⁷ A communication of a slander on a man to his wife,⁸ or to any member of his family,⁹ is a publication. But a communication by a husband to his wife is not.¹⁰ It is a publication to give it to the agent of the plaintiff.¹¹

As soon as the manuscript of a libel has passed out of the defendant's possession and control, it is published as to him. Thus a letter is published as soon as posted, and in the place where it is posted, if it is ever opened

tending to show it to no one, and it is stolen by a burglar, and published by him, it is submitted that there is no publication by me, either in civil or criminal proceedings. But it would be a publication by me if through any default of mine it got abroad, whether through my negligence or folly"; citing *Weir v. Hoss*, 6 Ala. 811, which seems to hold that a publication without the author's consent is no publication as to him.

¹ *R. v. Amphlit*, 4 Barn. & C. 35.

² *Baldwin v. Elphinston*, 2 W. Black. 1037; *Trumbull v. Gibbons*, 3 N. Y. City Hall Rec. 97.

³ *Whitfield v. R. R. Co.*, El. B. & E. 115; *Williamson v. Freer*, L. R. 9 Com. P. 393.

⁴ *Robinson v. Jones*, 4 L. R. Ir. 391.

⁵ *Odgers on Libel and Slander*, 153.

⁶ *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556.

⁷ *Clutterbuck v. Chaffers*, 1 Stark.

471; *Day v. Bream*, 3 Moody & R. 54.

⁸ *Wenman v. Ash*, 13 Com. B. 836.

⁹ *Miller v. Johnson*, 70 Ill. 59.

¹⁰ *Sesler v. Montgomery*, 78 Cal. 486. "The question seems never to have arisen in England, probably because in every such case there has been an immediate and undoubted publication of the same slander, or an exaggerated version thereof, by the wife to some third person, for which the husband would be equally answerable in damages, and which would be easier to prove. In America there is a *dictum* that the delivery of a libel by the author to his wife in confidence is privileged: *Trumbull v. Gibbons*, 3 City Hall Rec. 97"; *Odgers on Libel and Slander*, 153; *State v. Shoemaker*, 101 N. C. 670; and see *Wennhak v. Morgan L. R.*, 20 Q. B. Div. 635.

¹¹ *Brunswick v. Harmer*, 14 Q. B. 185.

anywhere by any third person.¹ The publication of a libel is sufficiently proved where it appears that a letter in the handwriting of the defendant, containing the libel, was found in the house of a neighbor of the person libeled, and by such neighbor and a third person opened and read.² A letter stating that the writer had heard of a slanderous report is admissible in evidence to prove the circulation of the report, and may be read for that purpose, the handwriting of the person being proved; but it is not admissible to prove that the defendant had propagated the report.³ Evidence that a newspaper came from the defendant's office, and was one copy of an edition of the same date, is proof of publication.⁴ So distributing newspapers containing libelous matter, and receiving money for them by an agent, is sufficient evidence of publication.⁵

Where the only publication is one brought about by the plaintiff's own act, it has been held that this is not sufficient to give the right of action, on the principle of the maxim, *Volenti non fit injuria*. Damages cannot be recovered for the repetition of slanderous words spoken by another, whether true or false, when such words were repeated by the defendant at the request of the plaintiff.⁶

¹ *Ward v. Smith*, 6 Bing. 749; *Clegg v. Laffer*, 3 Moore & S. 727; *Warren v. Warren*, 1 Crompt. M. & R. 250; *Shipley v. Todhunter*, 7 Car. & P. 680.

² *Swindle v. State*, 2 Yerg. 581; 24 Am. Dec. 515.

³ *Schwartz v. Thomas*, 2 Wash. 167; 1 Am. Dec. 479.

⁴ *State v. Jeandell*, 5 Harr. (Del.) 475.

⁵ *Respublica v. Davis*, 3 Yeates, St. 128; 2 Am. Dec. 366.

⁶ *Haynes v. Leland*, 29 Me. 223; *Sutton v. Smith*, 13 Mo. 120; *King v. Waring*, 5 Esp. 15; *Smith v. Wood*, 3 Camp. 323; *Warr v. Jolly*, 6 Car. & P. 497; *Weatherston v. Hawkins*, 1 Term Rep. 110; *Hopwood v. Thorn*, 8 Com. B. 293; *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556; *Nott v. Stod-*

dard, 38 Vt. 25; 88 Am. Dec. 633; *Heller v. Howard*, 11 Ill. App. 554. *Contra*, *Duke of Brunswick v. Harmer*, 14 Q. B. 185; which holds that where the words have been previously uttered, suit may be brought on a repetition sought by plaintiff. And in *Griffiths v. Lewis*, 14 Jur. Q. B. 197, Lord Denman, C. J., said: "Injurious words having been uttered by the defendant respecting the plaintiff, the plaintiff was bound to make inquiry on the subject. When she did so, instead of any satisfaction from the defendant, she gets only a repetition of the slander. The real question comes to this, Does the utterance of slander once give the privilege to the slanderer to utter it again whenever he is asked for an explanation? It is the constant

The allegations of the answer that the matters contained in the publication are true are not admissible on plaintiff's behalf as a republication.¹ The testimony given by a witness on a trial, in which he acknowledged the uttering of certain words alleged to be slanderous, cannot be proved as an admission in a subsequent action for slander brought against him.² Where a letter containing a libel is sent sealed, and the writer subsequently states in the presence of witnesses that he had got a certain person to write the letter for him; that he had signed his own name to it and kept a copy; and also states what the contents of the letter were, but without producing it or a copy of it, — this is a sufficient publication.³ Proof that the words were spoken to plaintiff or in his presence need not be made; it suffices to show that they were spoken to a different person.⁴

ILLUSTRATIONS. — A, by mistake, directed and posted a libel on B to B's employer, instead of to B. *Held*, a publication: *Fox v. Broderick*, 14 Ir. C. L. Rep. 453. A wrote a libelous letter to B, but showed it to C before posting it. *Held*, a publication: *Snyder v. Andrews*, 6 Barb. 43; *McCombs v. Tuttle*, 5 Blackf. 431. The defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk lawfully and in the usual course of business. *Held*, a publication by the defendant to the plaintiff's clerk: *Delacroix v. Thevenot*, 2 Stark. 63. An association ap-

course, when a person hears that he has been calumniated, to go with a witness to the party who he is informed has uttered the injurious words, and say, 'Do you mean, in the presence of witnesses, to persist in the charge you have made?' And it is never wise to bring an action for slander unless some such course has been taken. But it never has been supposed that the persisting in and repeating the calumny, in answer to such a question, which is an aggravation of the slander, can be a privileged communication; and in none of the cases cited has it ever been so decided." The testimony of

ministers who in their ministerial office have drawn from defendant statements of an ancient transaction, which is the ground of suit, is not admissible to show publication of the slander: *Vickers v. Stoneman*, Mich. 1889. A slander, once barred, cannot be revived by an admission that it had formerly been made, and malice cannot be attached to such admission: *Vickers v. Stoneman*, Mich. 1889.

¹ *Young v. Kuhn*, 71 Tex. 645.

² *Osborn v. Forshee*, 22 Mich. 209.

³ *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

⁴ *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489.

pointed a committee to investigate a bill presented by a member, and the committee, without authority, made a libelous report in print at a regular meeting, by placing on the secretary's desk copies thereof, which were then freely taken from the desk by the members present. The association then voted to hold a special meeting for action on the report, at which meeting a vote was passed to adopt it. *Held*, that there was no publication of the libel by the association: *Sénancour v. Société La Prévoyance*, 146 Mass. 616. A witness swore that he was a printer, and had been in the office of the defendant, where a certain paper was printed, and he saw it printed there, and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office. *Held*, *prima facie* evidence of the publication by the defendant: *Southwick v. Stevens*, 10 Johns. 443. The libel was published in a newspaper printed in another state, but which usually circulated in a particular county in Massachusetts, and the number containing the libel was actually received and circulated in the given county. *Held*, conclusive evidence of a publication within the county: *Commonwealth v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214. The entry of the resolution of excommunication from membership in a church on the minute-book of the session, and the exhibition of it to the members for their signatures, *held*, not a publication: *Landis v. Campbell*, 79 Mo. 433; 49 Am. Rep. 239. Pending prosecution of a criminal charge against A, defendant wrote to A's father, stating that he was reliably informed that the prosecuting attorney had been bribed to release A, on consideration of the father employing him on a contingent fee in a suit against defendant. *Held*, a sufficient publication: *Young v. Clegg*, 93 Ind. 371. Within six months before suit brought, the defendant said, concerning the words alleged to be actionable, but which were barred by the statute, "I never denied what I have said, and I will stand up to it." *Held*, not a repetition of what he had previously said, and that an action could not be sustained thereon: *Fox v. Wilson*, 3 Jones, 485. The plaintiff, after receiving a libelous letter from the defendant, sent for a friend of his and also for the defendant; he then repeated the contents of the letter in their presence, and asked the defendant if he wrote that letter; the defendant, in the presence of the plaintiff's friend, admitted that he had written it. *Held*, no publication by the defendant to the plaintiff's friend: *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556.

§ 1237. Who Liable — All Parties Instrumental in Publishing Liable.— All persons instrumental in any way

in having the defamatory matter published are jointly and severally responsible.¹ It is no defense that the party sued did not compose it, if he published it.² A master or principal is liable for the defamatory words of his servant or agent, if they are spoken or published with his authority or consent, express or implied;³ or if, though not so authorized, they are subsequently ratified.⁴ A person who requests or commands another to publish a libel is responsible as though he published it himself. Thus a principal may be liable for a libel published by his agent in the course of his business, and he may be either joined with the agent in the suit or sued alone as principal.⁵ The assent of the proprietor of a business must be presumed to have been given to the reports, advertisements, etc., published by his agents in managing it, and to the letters written by them in carrying it on.⁶ The request may be implied, as where a person sends a manuscript to the editor of a paper, or makes a statement to a reporter.⁷ One partner in a firm engaged in dealing in furniture and draperies is not, merely because of being partner, liable for a libel published by another partner; or a servant of the firm, by placing a placard on a piece of furniture, the property of the firm, offering it for sale.⁸ That defendant threatened to publish libelous matter of the plaintiff, and that it was afterwards published, is some evidence from which a jury may infer that defendant was

¹ Cooley on Torts, 194. See Bentley v. Reynolds, 1 McMull. 16; 36 Am. Dec. 251.

² "If one reads a libel, that is no publication of it; or if he hears it read, it is no publication of it; for before he reads or hears it, he cannot know it to be a libel; or if he hears or reads it, and laughs at it, it is no publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel; but if after he has read or heard it, he repeats it, or any part of it, in the hearing of others, or after that he knows

it to be a libel, he reads it to others, that is an unlawful publication of it": John Lamb's Case, 9 Rep. 60.

³ Odgers on Libel and Slander, 360.

⁴ Odgers on Libel and Slander, 360; and see Title Agency.

⁵ Philadelphia etc. R. R. Co. v. Quigley, 21 How. 202; Maynard v. Ins. Co., 34 Cal. 43; 91 Am. Dec. 672.

⁶ Cooley on Torts, 195.

⁷ Odgers on Libel and Slander, 155; Bond v. Douglas, 7 Car. & P. 626.

⁸ Woodling v. Knickerbocker, 31 Minn. 268.

the author of the article.¹ One who writes an article, and employs another person as his agent to translate it into another language and publish it, will be liable if the article so published is libelous, although the translation is inaccurate.² A joint publication of a libel by two defendants is sufficiently proved by evidence that, pursuant to a previous proposal between them, one wrote the letter containing the libel, the other assisting in composing it, and that it was then sent by mail to the person to whom it was addressed.³ But proof that a person wrote a libelous article from matter communicated partly orally and partly in writing to him by another person, is not sufficient evidence to prove that the latter published or procured the former to publish the libel, where it does not appear that he suspected the communication would be used for such a purpose.⁴

That one has already been sued is no defense to an action brought against any of the others in respect of the same libel.⁵ Nor is the fact that such actions are pending to be taken into consideration by the jury in assessing the damage arising from the publication by the present defendant.⁶ But if there be two distinct and separate publications of the same libel, a defendant who was concerned in the first publication, but wholly unconnected with the second, would not be liable for any damages which he could prove to have been the consequence of the second publication, and in no way due to the first.⁷

ILLUSTRATIONS.—H. brought the manuscript of a libelous song to M. to have one thousand copies printed; M. printed one thousand, and sent three hundred to H.'s shop. H. gave several copies to a witness, who sang it about the streets. It did not appear in whose writing the manuscript was; but probably not in H.'s. *Held*, that both H. and M. had published the libel:

¹ *Bent v. Mink*, 46 Iowa, 576.

² *Wilson v. Noonan*, 27 Wis. 598.

³ *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768.

⁴ *Cochran v. Butterfield*, 18 N. H. 115; 45 Am. Dec. 363.

⁵ *Frescoe v. May*, 2 Fost. & F. 123.

⁶ *Harrison v. Pearce*, 1 Fost. & F. 567; 32 L. T. 298.

⁷ *Odgers on Libel and Slander*, 157.

Johnson v. Hudson, 7 Ad. & E. 233; 1 Har. & W. 680. The defendant's daughter, a minor, was authorized to make out his bills and write his general business letters; she chose to insert libelous matter in one letter. *Held*, that the father was not liable for the wrongful act of his daughter, in the absence of any direct instructions: *Harding v. Greening*, 8 Taunt. 42. D. and C. signed a written communication to a newspaper, libeling the character of H., and intrusted it to L. for publication. L. carried it to a correspondent of the newspaper, who re-wrote it, cutting it down, and signed the names of D. and C. without direct authority from them. It was published as thus re-written and signed. D. and C. saw the publication and did not disavow it, and D. refused to disavow it to a person sent to him by H. on the subject, and said he had signed it. *Held*, that a finding against D. and C. in an action for libel by H. would be affirmed as to D. and reversed as to C.: *Dawson v. Holt*, 11 Lea, 583; 47 Am. Rep. 312. C. told the editor of a newspaper several good stories against the Rev. J. K., and asked the editor to "show Mr. K. up"; subsequently the editor published the substance of them in the newspaper. *Held*, a publication by C., although the editor knew of the facts from other quarters as well: *R. v. Cooper*, 15 L. J. Q. B. 206; 8 Q. B. 533. At the meeting of the board of guardians, at which reporters were present, it was stated that the plaintiff had turned his daughter out of doors, and that she consequently had been admitted into the workhouse and had become chargeable to the parish. E., one of the guardians, said, "I hope the local press will take notice of this very scandalous case," and requested the chairman, P., to give an outline of it. This P. did, remarking, "I am glad gentlemen of the press are in the room, and I hope they will give publicity to the matter." E. added, "And so do I." From the notes taken in the room the reporters prepared a condensed account, which appeared in the local newspapers, and which, though partly in the reporters' own language, was substantially a correct report of what took place at the meeting. *Held*, that the trial court was wrong in directing the jury that there was no evidence to go to the jury that P. and E. had directed the publication of the account which appeared in the papers: *Parkes v. Prescott*, L. R. 4 Ex. 169. An action was brought for libel in causing to be published a petition asking plaintiff, a county commissioner, to resign, because he had acted and voted as an officer in matters involving his own private interests; it was alleged, and some evidence was introduced to show, that the petition was published in a newspaper and circulated from hand to hand. *Held*, that every person signing the paper knowing that it was intended to be printed, or who signed it and delivered it to another without knowing that it would be printed, was guilty of circu-

lating it; that signing and delivering it would be in itself a publication; and that if no protest or direction against its being printed was made by the signer, and it was afterwards printed by the person to whom it was delivered, or by his authority, it was no defense that the signer did not intend or direct its publication in the paper: *Cotulla v. Kerr*, Tex. 1889.

§ 1238. **Same — Newspapers.** — For a libel in a newspaper, editor, author, publisher, proprietor, and printer, if different persons, are all liable, jointly or severally, for the entire damage done.¹ The proprietor or publisher of a newspaper edited by another is responsible for a libel published therein, though without his knowledge.² And the publisher is liable, although the name of the author is given.³ A newspaper proprietor who allows an editor or reporter to print in the columns of his paper whatever such editor or reporter may see fit is liable in damages for a libel so inserted by such editor or reporter, although such proprietor may not have directed its publication, and may have known nothing about it at the time.⁴ And in such a case, if the matter was inserted by the editor or

¹ *R. v. Walter*, 3 Esp. 21; *Watts v. Fraser*, 7 Car. & P. 369; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Hunt v. Bennett*, 19 N. Y. 175; *Thomas v. Croswell*, 7 Johns. 264; 5 Am. Dec. 269; *Harrison v. Pearce*, 1 Fost. & F. 567; *Keyzor v. Newcomb*, 1 Fost. & F. 559. "It is clear law that the proprietor of a newspaper is both civilly and criminally responsible for whatever appears in its columns, although the publication may have been made without his knowledge, and in his absence. For he must be taken to have ordered his servants to print and sell whatever manuscript the editor might send them for that purpose. The proprietor trusts to the discretion of the editor to exclude all that is libelous; if the editor fails in this duty, still the paper will be printed and published by the proprietor's servants, by virtue of his general orders. So if a master printer has contracted to print a monthly magazine, he will be liable for any libel that may appear in any

number printed at his office. So every bookseller must be taken to have told his shopmen to sell whatever books or pamphlets are in his shop for sale; if any one contain libelous matter, the bookseller is (*prima facie* at all events) liable for its publication by his servant by reason of such general instructions": *Odgers on Libel and Slander*, 360.

² *Andres v. Wells*, 7 Johns. 260; 5 Am. Dec. 267; *Lewis v. Hudson*, 44 Ga. 572; *Harrison v. Pearce*, 1 Fost. & F. 567; *Perret v. Times*, 25 La. Ann. 170; *Atkins v. Johnson*, 43 Vt. 78; 5 Am. Rep. 260; *Dunn v. Hall*, 1 Ind. 345; *Scripps v. Reilly*, 35 Mich. 371; 24 Am. Rep. 575; *Storey v. Wallace*, 60 Ill. 51; *Buckley v. Knapp*, 48 Mo. 152; *Huff v. Bennett*, 4 Sandf. 120; *Curtis v. Mussey*, 6 Gray, 261.

³ *Dole v. Lyon*, 10 Johns. 447; 6 Am. Dec. 346.

⁴ *Bruce v. Reed*, 104 Pa. St. 408; 49 Am. Rep. 586.

reporter while acting for the proprietor within the general scope of his employment, the proprietor will be answerable in exemplary damages for the malice, gross negligence, or wantonness of the editor or reporter in like manner as though he had done the wrong in proper person.¹ Thus a proprietor of a newspaper will be held liable for an accidental slip made by his printer's man in setting up the type,² or for a libelous advertisement inserted by the editor without his knowledge.³

The publisher is not responsible for a libel which he does not know to be libelous.⁴ A newspaper proprietor is not responsible in exemplary damages for the actual malice of a reporter in procuring the publication of a libelous article, unless the former has participated in or ratified and confirmed the malicious act.⁵ One cannot be held liable for a libel published in a newspaper upon a showing that he was secretary and treasurer of a joint-stock association owning the paper; that he owned a majority of the stock of the association, and had a kind of supervision of the articles published therein, but not a controlling influence, it appearing that he had no knowledge of or personal connection with the article in question.⁶ Where a printing-press and newspaper establishment were assigned to a person merely as security for a debt, and the press remained in the sole possession and management of the assignor, the ownership of the assignee is not such as to render him liable to an action as proprietor for a libelous publication.⁷ If one newspaper copy and publish a libelous article from another newspaper, the

¹ *Bruce v. Reed*, 104 Pa. St. 408; 49 Am. Rep. 586.

² *Shepherd v. Whitaker*, L. R. 10 Com. P. 502; 32 L. T. 402.

³ *Harrison v. Pearce*, 1 Fost. & F. 567.

⁴ *Dexter v. Spear*, 4 Mason, 115; *Smith v. Ashley*, 11 Met. 367; 45 Am. Dec. 217. In Michigan, on the question of mistake in reporting the contents of a legal document, it is

error to charge that such care as reporters usually use is the standard by which to determine the newspaper's liability. Reporters must use such degree of care as is reasonably sure to prevent mistake: *Park v. Detroit Free Press Co.*, Mich. 1889.

⁵ *Eviston v. Cramer*, 57 Wis. 570.

⁶ *Mecabe v. Jones*, 10 Daly, 222.

⁷ *Andres v. Welles*, 7 Johns. 260; 5 Am. Dec. 267.

first paper makes the article its own, and is liable for all damages resulting from its publication. The fact that it had previously appeared in the other paper is no defense, though it may tend to mitigate the damages.¹ Evidence that the plaintiff had in a previous action recovered damages against the other paper for the same article is altogether inadmissible, as in that action damages were given only for the publication of the libel in that paper.²

ILLUSTRATIONS.—The defendant, M., regularly printed a magazine, but had nothing to do with preparing the illustrations. One number contained a libelous lithographic print. *Held*, that he was liable for this print, though he had never seen it, because it was referred to in a part of the accompanying letter-press, which had been printed by his servants. The editor was liable also: *Watts v. Fraser and Moyes*, 7 Car. & P. 369; 7 Ad. & E. 223. The proprietor of a newspaper on going away for a holiday expressly instructed his acting editor to publish nothing exceptionable, personal, or abusive, and warned him especially to scan very particularly any article brought in by B. The editor permitted an article of B's to appear which contained libelous matter. *Held*, that the proprietor was liable, though the publication was made in his absence and without his knowledge: *Dunn v. Hall*, 1 Ind. 345.

§ 1239. **Repetition of Libel—Who Liable.**—Every person who sells or gives away a written or printed copy of a libel may be made a defendant, unless he was ignorant of the contents. Every sale or delivery of a written or printed copy of a libel is a new publication.³ But a servant who, in the course of business, delivers parcels containing libelous handbills is not liable in an action for libel, if shown to be ignorant of the contents of the parcel.⁴ The sender of a libelous letter is liable for its

¹ *Saunders v. Mills*, 3 Moore & P. 520; 6 Bing. 213; *Talbutt v. Clark*, 2 Moody & R. 313; *McDonald v. Woodruff*, 2 Dill. 244; *Hotchkiss v. Oliphant*, 2 Hill, 510.

² *Creevy v. Carr*, 7 Car. & P. 64; *Hunt v. Algar*, 6 Car. & P. 245.

³ *Duke of Brunswick v. Harmer*, 14 Q. B. 185; *Staub v. Van Bethuysen*, 36 La. Ann. 467.

⁴ *Day v. Bream*, 2 Moody & R. 54.

"A servant carries a libelous letter for his master, addressed to C. It is his duty not to read it. If he does read it, that is a publication by his master to him, although he was never intended to read it. If after reading it he delivers it to C., then this is a publication by the servant to C., for which the person libeled, not being C.,

further publication by the receiver, if such further publication was a probable consequence of sending it.¹ But one who authorized libelous words to be published in a Chicago newspaper is not liable for their republication in a San Francisco paper, in the absence of any evidence tending to connect him with the publication.² It is no defense to an action of libel for a publication in a newspaper that the publishers believed the article to be true,³ or that the person libeled has failed to prosecute for a previous publication of the libel.⁴

ILLUSTRATIONS. — A, at his news-stand, sold a newspaper containing a libel upon B. *Held*, that he was responsible in damages to B for publication: *Staub v. Van Benthuyssen*, 36 La. Ann. 467. Defendant sent to a newspaper as an advertisement a false statement that he wanted the plaintiff to pay a bill. The publisher put it among other "wants," one of which called for a "dead-head." A third person cut the advertisement out, pasted it on a postal card, and sent it to a young woman engaged to be married to plaintiff. *Held*, libelous, and that it was a question of fact whether the sending of the postal card was a natural consequence of the publication: *Zier v. Hofflin*, 33 Minn. 66; 53 Am. Rep. 9. Defendant at a hearing before the governor presented to him and to three other persons copies of a pamphlet prepared by a third person and bearing upon the matter in hand. This pamphlet contained a reflection upon plaintiff's character, plaintiff's name, however, not being given. There was no express malice, and defendant was ignorant of the precise contents of the pamphlet. *Held*, that the action was not maintainable: *Woods v. Wiman*, 47 Hun, 362. A libelous article indicating that a neighboring ticket-broker is not reliable is conspicuously posted forty days in the ticket-office of a railroad company whose principal terminus and office are in the same city. There is evidence that such office is used to publish general information of interest to purchasers of tickets. *Held*, that the jury may find that the company had knowledge

can sue either the master or the servant, or both. If the servant never reads it, but simply delivers it as he was bidden, then he is not liable to any action, unless he either knew, or ought to have known, that he was being employed illegally. If he either knew, or ought to have known, then it is no defense for him to plead, 'I was only

obeying orders": *Odgers on Libel and Slander*, 161.

¹ *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768.

² *Clifford v. Cochrane*, 10 Ill. App. 570.

³ *Cass v. New Orleans Times*, 27 La. Ann. 214.

⁴ *Curtis v. Mussey*, 6 Gray, 261.

of the character of the notices posted, and that the libel would not have remained posted so long had not the company authorized or ratified it: *Fogg v. R. R. Co.*, 148 Mass. 513.

§ 1240. **Repetition of Slander.**—Every person who repeats a slander to others which some one else has started, or which has been told to him, is liable.¹ It is no defense that he did not originate it, or that it was a current rumor, and he believed it true;² or that he says that he does not believe it,³ or although the charge was repeated for the purpose of asking advice;⁴ or that when he repeated it he gave his authority, or merely said that so and so said so.⁵ It is immaterial that the slanderous words were not repeated with any desire to extend their circulation, or confirm the story, or cause the person to whom it is told to believe it to be true.⁶ A slander, un-

¹ *Calloway v. Middleton*, 2 A. K. Marsh. 372; 12 Am. Dec. 409; *Evans v. Smith*, 5 T. B. Mon. 363; 17 Am. Dec. 74. Where one hears another make a charge which he repeats, he will not be exempt from liability, unless, at the time of repeating the words, he affords the person of whom the charge is made a cause of action against the original author: *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293.

² *Watkin v. Hall*, L. R. 3 Q. B. 396; *Carpenter v. Bailey*, 53 N. H. 590; *Calloway v. Middleton*, 2 A. K. Marsh. 372; 12 Am. Dec. 409; *Shenck v. Shenck*, 20 N. J. L. 208; *Funk v. Beverly*, 112 Ind. 190.

³ *Finch v. Finch*, 21 S. C. 342.

⁴ *Branstetter v. Dorough*, 81 Ind. 527.

⁵ *Johnson v. Brown*, 57 Barb. 118; *McPherson v. Daniels*, 10 Barn. & C. 270; *De Crespigny v. Wellesley*, 5 Bing. 392; *Inman v. Foster*, 8 Wend. 602; *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Dole v. Lyon*, 10 Johns. 447; 6 Am. Dec. 346; *Jarnigan v. Fleming*, 43 Miss. 711; 5 Am. Rep. 514; *Miller v. Kerr*, 2 McCord, 285; 13 Am. Dec. 722; *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420; *Johnston v. Lance*, 7 Ired. 448;

Skinner v. Powers, 1 Wend. 451; *Sans v. Joerris*, 14 Wis. 663; *Fowler v. Chester*, 26 Ohio St. 9. *Contra*, *Tatlow v. Jacket*, 1 Harr. (Del.) 333; 26 Am. Dec. 399.

⁶ In *Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345, the court say: "The uttering of the words is a wrongful act, purposely done, and this is sufficient to constitute legal malice. To prove legal malice, it is not necessary to show that the words were uttered from personal enmity or ill-will. When the words are uttered, the true measure of damages is the injury caused by the utterance. The 'story' uttered or repeated by the defendant contains a charge against the plaintiff of a nature to destroy her reputation. It was a false charge. It is no answer in any forum to say that she only repeated the story as she heard it. If the story was false and slanderous, she must repeat it at her peril. There is safety in no other rule. Often the origin of the slander cannot be traced. If it were, possibly it might be harmless. He who gives it circulation gives it its power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed. We think the instructions of the

like a written or printed libel, can seldom be circulated by an innocent hand, unconscious of the nature of his act; hence a person uttering slanderous words is liable only for the effect of his publication of them, and not for the results of their repetition by others,¹ unless the utterer intended that the words should be repeated in the way they were, or knew from the relations of the parties that they would certainly be.² In a leading case in New

learned judge were not in conformity to the law, as understood in this commonwealth: *Walcott v. Hall*, 6 Mass. 514; 4 Am. Dec. 173; *Alderman v. French*, 1 Pick. 18; 11 Am. Dec. 114; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 223; *Commonwealth v. Snelling*, 15 Pick. 337; *Stone v. Varney*, 7 Met. 91; 39 Am. Dec. 762; *Watson v. Moore*, 2 Cush. 133. The jury were instructed that if the defendant merely said there was a report in circulation of the kind set forth in the writ, and did not say so with any design to extend its circulation, or in any degree to cause the person whom she addressed to believe or suspect the charge which the story imputed to be true, or to add to it any sanction or authority of her own, or to give it any further circulation or credit, and it was true that such story was in circulation, it would not be actionable to say so. It seems scarcely possible that a story could be repeated by a person of any respectability under the circumstances and with the results supposed. To say that such a story is current, and to relate it to one before that time ignorant of its existence, necessarily gives it further circulation; and a party is presumed to know and intend the necessary consequences of his acts. And such is the case before us. The witness had never heard of the story, and expresses her disbelief of it. The defendant, so far from expressing a concurrence in the witness's disbelief, replies: 'It [the story] is all over the glass-house.' And when the witness says this could not be, or her husband, who worked at the glass-house, would have heard it, the defendant replied: 'It was not in the upper but the lower glass-house.'

The story is related to one before ignorant of it, without giving the person from whom it was received, without expressing any disbelief of it, without any apparent purpose of inquiry as to its truth, and with the assertion in reply to the disbelief of the witness of the currency of the report. It seems to us that the jury, treating the instructions as applicable to the case before them, may have been misled; that they may have understood the learned judge to mean that the simple repetition of a slanderous story, without express malice, was not actionable. But under the limitations stated, if they were possible, we think the rule laid down is not the law. A man cannot say that there is a story in circulation that A poisoned his wife, or B picked C's pocket in the omnibus, or that D has committed adultery, and relate the story, and when called upon to answer, say: 'There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it'; and for two very plain reasons: that the repetition of the story must, in the nature of things, give it currency; and the repetition without the expression of disbelief will confirm it. The danger is an obvious one, and long since pointed out, and it is, that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of a repetition."

¹ *Ward v. Weeks*, 7 Bing. 211; *Hastings v. Stetson*, 126 Mass. 329; 30 Am. Rep. 683; *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75; *Shurtleff v. Parker*, 130 Mass. 293; 39 Am. Rep. 454.

² *Ogders on Libel and Slander*, 167.

York the court say: "Where slanderous words are repeated innocently, and without an intent to defame, as under some circumstances they may be, I do not see why the author of the slander should not be held liable for injuries resulting from it as thus repeated, as he would be if these injuries had arisen directly from the words as spoken by himself."¹

ILLUSTRATIONS. — The defendant said to the plaintiff in the presence of others: "Thou art a sheep-stealing rogue, and farmer P. told me so." *Held*, actionable; *Gardiner v. Atwater*, Sayers, 265; *Lewes v. Walter*, 3 Bulst. 225; *Meggs v. Griffith*, Cro. Eliz. 400. The defendant said to the plaintiff, a tailor, in the presence of others: "I heard you were run away," *scilicet*, from your creditors. *Held*, actionable: *Davis v. Lewis*, 7 Term Rep. 17. W. told D. that P.'s horses had been seized from the coach on the road, that he had been arrested, and that the bailiffs were in his house. D. went about telling every one: "W. says that P.'s horses have been seized from the coach on the road, that he himself has been arrested, and that the bailiffs are in his house." *Held*, that D. was liable to an action by P. for the slander, although he named W. at the time as the person from whom he had heard it; that it was no justification to prove that W. did in fact say so: defendant must go further, and prove that what W. said was true: *McPherson v. Daniels*, 10 Barn. & C. 263; 5 Moody & R. 251. Mr. and Mrs. D. wrote a libelous letter to the directors of a missionary society, and sent a copy to the defendant, who published extracts from it in a pamphlet. The defendant stated that the letter was written by Mr. and Mrs. D., and at the time he wrote the pamphlet he believed all the statements made in the letter to be true. *Held*, no justification for his publishing it: *Tidman v. Ainslie*, 10 Ex. 63; *Mills v. Spencer*, Holt N. P. 533; *McGregor v. Thwaites*, 3 Barn. & C. 24. A rumor was current on the stock exchange that the chairman of the Southeastern Railroad Company had failed, and the shares in the company consequently fell; thereupon the defendant said: "You have heard what has caused the fall, — I mean, the rumor about the Southeastern chairman having failed." *Held*, that a plea that there was in fact such a rumor was no answer to the action: *Watkin v. Hall*, L. R. 3 Q. B. 396; see *Richards v. Richards*, 2 Moody & R. 557. W. was speaking to B. of the plaintiff, and said: "He is a rogue and a swindler; I know enough about him to hang him." B. repeated this to

¹ *Keenholts v. Becker*, 3 Denio, 352. But the decided cases hardly support this view: See illustrations *post*.

R. as W.'s statement. R. consequently refused to trust the plaintiff. *Held*, that the words were not actionable *per se*, and the damage was too remote: *Ward v. Weeks*, 7 Bing. 211; 4 Moore & P. 796. H. told Mr. W. that the plaintiff, his wife's dressmaker, was a woman of immoral character. Mr. W. informed his wife of this charge, and she ceased to employ the plaintiff. *Held*, that the plaintiff's loss of Mrs. W.'s custom was the natural and necessary consequence of the defendant's communication to Mr. W.: *Derry v. Handley*, 16 L. T., N. S., 263. A complaint for libel for words contained in a letter, and not actionable in themselves, alleged that the letter was read by third persons to whom the receiver showed it, and alleged special damage from this, and not from the reading by the receiver. *Held*, that the complaint was bad for not alleging that the writer authorized the receiver so to show it: *Gough v. Goldsmith*, 44 Wis. 262; 28 Am. Rep. 579.

§ 1241. **Construction of Defamatory Words.**—In the early history of the law, it was a maxim that where two meanings were possible to the words, they were to be construed *in mitiori sensu*. But this is not now the practice. "The rule that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them."¹ Where the words are such that the court will take judicial notice of their meaning, it may explain their meaning to the jury.² Thus it has been

¹ *Harrison v. Thornborough*, 10 Mod. 197; *Hamilton v. Dent*, 1 Hayw. 117; 1 Am. Dec. 552; *Beers v. Strong*, Kirby, 12; 1 Am. Dec. 10; *Logan v. Steele*, 1 Bibb, 593; 4 Am. Dec. 659; *Sawyer v. Eifert*, 2 Nott & McC. 511; 10 Am. Dec. 633; *McGowan v. Manifee*, 7 T. B. Mon. 314; 18 Am. Dec. 178; *Stallings v. Newman*, 26 Ala. 300; 62 Am. Dec. 723; *Little v. Barlow*, 26 Ga. 423; 71 Am. Dec. 219; *Thirman v. Matthews*, 1 Stew. 384; *Hogg v. Dorrah*, 2 Port. 212; *Butterfield v. Buffum*, 9 N. H. 156; *Ogden v. Riley*, 14 N. J. L. 186; 25 Am. Dec. 513; *Garrett v. Dickerson*, 19 Md. 418; *De Moss v. Haycock*, 15 Iowa, 149; *Campbell v. Campbell*, 54 Wis. 90; *Harrison v. Findley*, 23 Ind. 265; 85 Am. Dec. 456; *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

But see *Hopkins v. Beedle*, 1 Caines, 347; 2 Am. Dec. 191.

² "It is claimed that the court erred in defining to the jury the meaning of the abbreviation '*crim. con.*' There is nothing in this objection. Courts take judicial notice of the meaning of words and idioms in the vernacular of the language: 1 Greenl. Ev., sec. 5; and no colloquium or innuendo is necessary to point out their meaning. Where the meaning of the words is well settled by common usage, there is no use of calling persons to testify as to what was meant by them at the time they were uttered, or to explain their meaning if published in a newspaper. The words '*crim. con.*' are usually understood as an abbreviation for 'criminal conversation,' and these words have

held that the court will notice the meaning of "Beecher business" when applied to a clergyman,¹ or the term "pettifogging shyster," as applied to a lawyer.² An allegation that the defendant charged the plaintiff with sleeping with a man is sufficiently supported by proof that he charged her with being in bed with him.³ A charge that a woman "slept" with a man not her husband is a charge of unchastity.⁴ When the charge against a married woman is that she is a bad woman, a bitch, and a whore, the court cannot say, as matter of law, that the word "bad" does not import a want of chastity, but it is for the jury to determine the sense in which the word was used.⁵ But the word "bitch" does not import a charge of adultery or prostitution.⁶ So charging a person with keeping "a bad house" is not in itself actionable. The words do not necessarily imply "a bawdy-house."⁷ A statement in a newspaper that one was arrested for drunkenness does not assert that he was in fact drunk.⁸

of themselves acquired a fixed and universal significance. Equally unobjectionable was the translation by the court of the words '*flagrante delicto*.' While a libel published in a foreign language would, ordinarily, be interpreted by witnesses skilled in the knowledge of both languages, there is a class of foreign words that have been so far anglicized by common use as to have become, substantially, a part of the language. Instances of these are, '*habeas corpus*,' '*bona fide*,' '*prima facie*,' '*a fortiori*,' from Latin, and a large number from the French and other modern languages. Whenever such words occur, it is clearly within the province of the court to define them to the jury: Townshend on Slander and Libel, 160, note 2; Homer v. Taunton, 5 Har. & McH. 661, 667; Barnet v. Allen, 3 Hurl. & N. 376; Hoare v. Silverlock, 12 Ad. & E., N. S., 624. It is only where the words are ambiguous, obscure, or used in a local or technical sense that an innuendo is necessary. Indeed, if the whole libel had been published in a foreign language, and the court had assumed to

translate and define its meaning to a jury without the aid of experts, it is difficult to see how this error could be made the ground for a new trial": Gibson v. Cincinnati Enquirer, 5 Cent. L. J. 380.

¹ Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

² Bailey v. Kalamazoo Pub. Co., 40 Mich. 251.

³ Barnett v. Ward, 36 Ohio St. 107; 38 Am. Rep. 561.

⁴ Barnett v. Ward, 36 Ohio St. 107; 38 Am. Rep. 561. "F—d" imports whoredom, and is actionable *per se*: Linck v. Kelly, 25 Ind. 278; 87 Am. Dec. 362. But not "screwed": Linck v. Kelly, 25 Ind. 278; 87 Am. Dec. 362; Miles v. Vanhorn, 17 Ind. 245; 79 Am. Dec. 477; K. v. H., 20 Wis. 239; 91 Am. Dec. 397.

⁵ Riddell v. Thayer, 127 Mass. 487.

⁶ K. v. H., 20 Wis. 239; 91 Am. Dec. 397.

⁷ Peterson v. Sentman, 37 Md. 140; 11 Am. Rep. 534.

⁸ Stacy v. Portland Pub. Co., 68 Me. 279.

Words are construed according to their ordinary meaning; technical words or localisms according to their technical or local meaning. Where the libel is based on the use of a certain word in a publication, and it is clear, from a consideration of the whole publication, that such word was used in its popular and ordinary meaning, and not in a technical sense, the court should so decide, and no evidence of its technical meaning should be permitted to go to the jury.¹ Where a libelous article is circulated in a foreign language, it is not necessary to show that it was understood, nor that those conversant with such language were citizens.² But where the declaration in slander charges the defendant with speaking of the plaintiff certain actionable words in the French language, the plaintiff must aver in his declaration what he understands to be the meaning in English of the French words charged; and he must prove on the trial under the general issue, not only the speaking of some of the French words laid which are actionable, but he must also prove that the translation of those words is correct.³ The meaning the party intended to convey is irrelevant.⁴ Defendant is responsible for his words in the sense in which he used them.⁵ But evidence is admissible to show that words apparently actionable in themselves were not used in an actionable sense.⁶ The words alleged to be slanderous are not to be construed absolutely in the sense in which the hearers understood them, but in the sense in which, in the light of all explanatory circumstances known to speaker and hearers, they were calculated to impress the hearers' minds, and be naturally understood.⁷ Where the words charged are ambiguous, the extraneous circumstances under which they were published may be considered

¹ *Rodgers v. Kline*, 56 Miss. 808; W. 445; *Prime v. Eastwood*, 45 Iowa, 31 Am. Rep. 389.

² *Steketee v. Kimm*, 48 Mich. 322.

³ *Hinckley v. Grosjean*, 6 Blackf. 351.

⁴ *Hankinson v. Bilby*, 16 Mees. &

⁵ *Foval v. Hallett*, 10 Ill. App. 265.

⁶ *Fawsett v. Clark*, 48 Md. 494; 30 Am. Rep. 481.

⁷ *Dixon v. Stewart*, 33 Iowa, 125.

by the jury in ascertaining their meaning and application to the plaintiff.¹ In an action of libel for ambiguous or ironical words, evidence is competent to show the application and interpretation put on the words by the plaintiff's acquaintances; and evidence of subsequent hostile publications and oral declarations is admissible to show the *animus*.² But where the libel is expressed in ordinary language, witnesses should not be allowed to testify as to the meaning which they understood the libel to convey, or that they understood it to apply to the plaintiff an offensive term found in the article.³ All parts of the libel should be considered together; isolated passages must be judged of in connection with the whole publication.⁴

ILLUSTRATIONS. — In an action of slander by M., a clerk in the store of S., against S. and wife for her alleged words to O., that if she "had not seen the shoes on O.'s feet, S. would never have received a cent for them," meaning that M. had embezzled the shoes. *Held*, that she could not be permitted to testify that she only meant that M. had forgotten to charge the shoes: *Sternau v. Marx*, 58 Ala. 608. The slanderous words charged were, "You have cheated and robbed orphan children," but when taken in connection with the averment and innuendo in the complaint, it appeared that they charged merely that the plaintiff had procured the assignment of a mortgage by some fraud. *Held*, that the words were not actionable of themselves, as the connection showed that they were not intended to impute the crime of robbery: *Filber v. Dautermann*, 28 Wis. 134. The words alleged and proved were: "When he [the plaintiff] was highway commissioner he stole one thousand dollars from the town." The defendant tried to show that he referred only to the fact of plaintiff's failure to produce vouchers for that sum in accounting. None of the plaintiff's witnesses testified that the defendant explained the words, and only one that he understood them to relate to money which came to the plaintiff's hands as commissioner. *Held*, that the ordinary import of the words imputed larceny; that a nonsuit was properly refused:

¹ *Downing v. Brown*, 3 Col. 571.

⁴ *Hunt v. Algar*, 6 Car. & P. 245;

² *Knapp v. Fuller*, 55 Vt. 311; 45 Am. Rep. 618.

Chalmers v. Payne, 2 Crompt. M. & R. 156; *O'Connor v. Sill*, 60 Mich.

³ *Gribble v. Pioneer-Press Co.*, 37 Minn. 277.

Hayes v. Ball, 72 N. Y. 418. Two declarations in actions of slander against different persons each alleged that the respective defendants, in speaking of the death of the plaintiff's wife, accused him of the crime of murder, the words in one case being, "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else; he is to blame for it"; and in the other case, "He knows how she came to her death; he killed her; he is to blame for her death; there was foul play there." *Held*, on demurrer, that the former words in their natural sense did not import a charge of murder, but that it could not be said that the latter words might not fairly be considered to impute such a crime: *Thomas v. Blasdale*, 147 Mass. 438.

§ 1242. **The Innuendo—The Colloquium.**—The innuendo is a statement by the plaintiff of the construction which he puts upon the words himself, and which he will endeavour to induce the jury to adopt at the trial. Where the words *prima facie* are not actionable, an innuendo is essential to the action. It is necessary to bring out the latent injurious meaning of the defendant's words; and such innuendo must distinctly aver that the words bear a specific actionable meaning.¹ An innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear.² If the words are incapable of the meaning ascribed to them by the innuendo, and are *prima facie* not actionable, the declara-

¹ *Odgers on Libel and Slander*, 100; *Rice v. Simmons*, 2 Harr. (Del.) 417; 31 Am. Dec. 766; *Beardsley v. Tappan*, 1 Blatchf. 588; *Patterson v. Edwards*, 7 Ill. 720; *Hays v. Mitchell*, 7 Blackf. 117; *Caldwell v. Abbey*, *Hardin*, 529; *Patterson v. Wilkinson*, 55 Me. 42; 92 Am. Dec. 568; *Dorsey v. Whippis*, 8 Gill, 457; *McCuen v. Ludlum*, 17 N. J. L. 12; *Evans v. Tibbins*, 2 Grant Cas. 451; *Gosling v. Morgan*, 32 Pa. St. 273; *Herst v. Borbridge*, 57 Pa. St. 62; *Taft v. Howard*, 1 D. Chip. 275; *Nichols v. Packard*, 16 Vt. 83; *Cramer v. Noonan*, 4 Wis. 231. The innuendo is not essential under the codes of some of the states: See note

to *Van Vechten v. Hopkins* in 4 Am. Dec. 350, 351.

² *Hayes v. Mitchell*, 7 Blackf. 117; *Emery v. Prescott*, 54 Me. 389; *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Brown v. Piner*, 6 Bush, 518; *Patterson v. Wilkinson*, 55 Me. 42; 92 Am. Dec. 568; *Bourreseau v. Detroit etc. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320. The words charged were, "D. killed my beef." *Held*, that there being no colloquium, the words not necessarily importing a felony, they could not be extended in their meaning by the innuendo: *Hansbrough v. Stinnett*, 25 Gratt. 495.

tion will be held bad on demurrer.¹ If, however, the court or the judge think the words are capable of the meaning ascribed to them, however improbable it may appear that they were in fact so understood, then it must be left to the jury to say whether such is or is not their true meaning.² Where the words are obviously defamatory on their face, no innuendo is necessary.³ Allegorical terms of well-known import are libelous *per se*, without innuendoes to explain their meaning; e. g., imputing to a person the qualities of the "frozen snake," or calling him "Judas."⁴ Where the words are *prima facie* defamatory on their face, no innuendo is necessary,⁵ and if set out, need not be proved.⁶ An innuendo is unnecessary, and may be rejected as surplusage, in an action of libel where the writing on its face relates to the plaintiff, and the words are libelous in themselves.⁷

Where the words are in a foreign language, or are technical or provincial terms, an innuendo is absolutely necessary to disclose an actionable meaning. So, too, an innuendo is essential where ordinary English words are not in the particular instance used in their ordinary English signification, but in some peculiar sense.⁸ Thus to say of a woman that "she was getting fat; some one had slipped up on the blind side of her," is not actionable, without special averment of the meaning; but may be shown to be actionable by distinct averments in the complaint that, in the particular instance, they were used with intent to convey a charge of fornication and pregnancy, or that, in the locality where they were spoken, they had acquired that sense.⁹ A remark that "if A. [plain-

¹ Goodrich v. Hooper, 97 Mass. 1; 93 Am. Dec. 49.

² Odgers on Libel and Slander, 101.

³ Bourreseau v. Detroit etc. Co., 63 Mich. 425; 6 Am. St. Rep. 320.

⁴ Hoare v. Silverlock, 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

⁵ Odgers on Libel and Slander, 107.

⁶ Coleman v. Southwick, 9 Johns. 45; 6 Am. Dec. 253; Croswell v. Weed, 25 Wend. 621.

⁷ Adams v. Lawson, 17 Gratt. 250; 94 Am. Dec. 455.

⁸ Odgers on Libel and Slander, 109.

⁹ Emmerson v. Marvel, 55 Ind. 265.

tiff] had not gone away, we should issue warrants for him," is susceptible of the meaning given it by the innuendo that plaintiff "had absconded, and had been guilty of some offense for which he was liable to arrest."¹ A charge that "plaintiff went to L. and collected fourteen hundred dollars of our money, and went West with it," will bear the innuendo that plaintiff had absconded with money belonging to defendant and his associates in business. The statement that plaintiff is trying to get and convert to his own use the property of R. without paying for it may be properly connected with an innuendo that he is attempting to defraud R. out of his property.²

Wherever the defendants words are capable both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning the hearers or readers would on the occasion in question have reasonably given to the words. Here an innuendo is essential to show the latent injurious meaning.³ Thus the words "she is sick" cannot be shown to have been understood by the hearers as meaning "she has had a child," without proper averments that they were so understood.⁴ But where the words can bear but one meaning, and that is obviously not defamatory, then no innuendo or other allegation on the pleadings can make the words defamatory.⁵ The assertion that plaintiff "has left town," though made to a person of whom plaintiff had purchased goods on credit which were then *in transitu*, is not capable of

¹ Ayres v. Toulmin, Mich., 1889.

² Ayres v. Toulmin, Mich., 1889.

³ Thompson v. Lusk, 2 Watts, 17; 26 Am. Dec. 91; Miles v. Vanhorn, 17 Ind. 245; 79 Am. Dec. 477; Havemeyer v. Fuller, 60 How. Pr. 316. Where a plaintiff sets out the meaning of words not libelous *per se* by an innuendo, he is bound by such construction, and must prove by a preponderance of the evidence that the readers so understood them: Johnston v. Morrison, Ariz., 1889. If the language

used is not in itself actionable, the intent with which it was used is to be drawn from the extraneous facts as well. If the language is used ironically, enough must be alleged to make it so appear: Brown v. Burnett, 10 Ill. App. 279.

⁴ Smith v. Gaffard, 33 Ala. 168.

⁵ Sheely v. Biggs, 2 Har. & J. 364; 3 Am. Dec. 552; Coburn v. Harwood, Minor, 93; 12 Am. Dec. 37; Brown v. Burnett, 10 Ill. App. 279.

the innuendo that plaintiff had absconded and given up his business, and was insolvent. Nor is the statement that plaintiff "has obtained commission on the sale of type-writers without giving his partners any benefit thereof" made actionable by the innuendo that plaintiff had been guilty of defrauding his partners as a member of said firm, in the absence of any allegation that he was under obligation to share the profits of the sales with his partners.¹ Where an alleged libel charges seduction, adultery, and abortion as parts of a continuous transaction, the plaintiff cannot, by confining the innuendo to a portion, limit the defendant's right to justify it as an entirety, and to show that the plaintiff had no reputation that could have been injured by any part of it.² An innuendo cannot be aided by the mere opinion of a witness.³

A colloquium shows that the matter alleged defamatory applies to the plaintiff and the circumstances under which it was used.⁴ But there must be a sufficient colloquium.

¹ *Ayres v. Toulmin*, Mich., 1889.

² *Bathrick v. Detroit Co.*, 50 Mich. 629; 45 Am. Rep. 63.

³ *Pittsburgh etc. R. R. Co. v. McCurdy*, 114 Pa. St. 554; 60 Am. Rep. 363.

⁴ "A colloquium seems to show that the words were spoken in reference to the matter of the averment": *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Bloss v. Tobey*, 2 Pick. 328. Where the words complained of derive their slanderous import from extrinsic facts, the declaration must aver those facts, and connect them by a colloquium with the words laid: *Linville v. Earlywine*, 4 Blackf. 470; *Fowle v. Robbins*, 12 Mass. 498; *Bloss v. Tobey*, 2 Pick. 326; *Carter v. Andrews*, 16 Pick. 1. See also *Commonwealth v. Child*, 13 Pick. 198; *Commonwealth v. Snelling*, 15 Pick. 321; *Nye v. Otis*, 8 Mass. 122; 5 Am. Dec. 79; *Tebbetts v. Goding*, 9 Gray, 254; *Edgerly v. Swain*, 32 N. H. 478; *Kinney v. Nash*, 3 N. Y. 177; *Watts v. Greenleaf*, 2 Dev. 115; *Brown v. Brown*, 14 Me. 317; *Harris v. Burley*,

8 N. H. 257; *Stanley v. Brit*, Mart. & Y. 222; *Ryan v. Madden*, 12 Vt. 51; *Sanderson v. Hubbard*, 14 Vt. 462; *Carter v. Andrews*, 16 Pick. 6; *Shaw, C. J.*, saying: "If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact then must be averred in a traversable form, with a proper colloquium, to wit, an averment that the words in question are spoken of and concerning such usage or report, or fact, whatever it is, which gives to words otherwise indifferent the particular defamatory meaning imputed to them. Then the word 'meaning' or 'innuendo' is used with great propriety and effect in connecting the matters thus introduced by averments and *colloquia*, with the particular words laid, showing their identity and drawing what is now the legal inference from the whole declaration."

Thus a charge that the defendant said of the plaintiff that she kept a "bad house," innuendo, a bawdy-house, will not do, for want of proper colloquium, i. e., a statement of the circumstances under which they were used, or the subject-matter of the conversation, so that it can be seen that the words were used in the sense claimed by the plaintiff.¹ The same has been held where the declaration charged the defendant with saying of the plaintiff "she is a bad girl," innuendo, a prostitute,² and she keeps a "public house," innuendo, a bawdy-house.³ The plaintiff may be nonsuited for the want of a colloquium in his declaration averring that he is the person alluded to in a libelous paper so ambiguous that from a mere perusal of it the person intended cannot be ascertained. An innuendo cannot supply the place of such colloquium.⁴ But where words charged to have been spoken are unequivocal, and convey a direct imputation of crime, and point out with certainty the person to whom they are intended to apply, no colloquium is necessary.⁵ An inference expressed in the colloquium or innuendo in a complaint for slander, if not correct from the words alleged to have been spoken, cannot affect the sufficiency of the averments of the declaration. This is on the ground that a declaration in slander may be sufficient without the colloquium or innuendoes, which in such case may be regarded as surplusage.⁶

ILLUSTRATIONS. — A declaration alleged that defendant spoke of and concerning the plaintiff: "He [meaning said plaintiff] poisoned my cattle. They were poisoned with Paris green. They were poisoned from a pail that had bran and poison in it, and V. [meaning said plaintiff] put it there'; thereby meaning and intending to charge that he, the said plaintiff, committed

¹ *Peterson v. Sentman*, 37 Md. 140; *Hall v. Montgomery*, 8 Ala. 510; 11 Am. Rep. 534.

² *Snell v. Snow*, 13 Met. 278; 46 Am. Dec. 730.

³ *Dodge v. Lacey*, 2 Ind. 213.

⁴ *Wilson v. Hamilton*, 9 Rich. 382.

⁵ *Thirman v. Matthews*, 1 Stew. 384;

Rodebaugh v. Hollingsworth, 6 Ind. 339; *Croswell v. Weed*, 25 Wend. 621; *Walrath v. Nellis*, 17 How. Pr. 72.

⁶ *Ausman v. Veal*, 10 Ind. 355; 71 Am. Dec. 332.

the crime of willfully and maliciously administering poison to the cattle of him, the said defendant, . . . whereby said cattle were poisoned and killed." *Held*, that the innuendo aided the want of averment of the statutory elements essential to the crime of poisoning cattle, and the declaration stated a cause of action: *Vickers v. Stoneman*, Mich., 1889. A declaration averred that plaintiff, being a married man, had a hostler in his employ who was also married, and that a libelous communication by defendant concerned them in such relation, which communication was sent to plaintiff's wife, and was as follows: "Do you know that the name of the hostler and yourself are coupled together, . . . and claimed that you two are intimate together; and some shake their heads and say it looks strange that he should exchange with his hostler?" *Held*, that the language quoted, in connection with the facts alleged in the preceding averments and colloquium, reasonably imported that plaintiff had been criminally intimate with his hostler's wife: *Wilcox v. Moon*, Vt., 1889.

§ 1243. **Certainty as to Charge — Proof.** — Where the defamatory words are alleged to charge the plaintiff with a crime, though, as we have seen, they must charge him with an indictable crime, it is not essential that the crime should be expressly charged; it is sufficient if the language used imputes the commission of the crime, and that the hearers should so understand it.¹ Defamation may be in the form of insinuation as well as of positive assertion, provided the meaning is plain.² The precise words laid in the complaint need not be proved; the substance is sufficient.³ But this is held to mean, in some states, that though it will not defeat the action if more words or

¹ Odgers on Libel and Slander, 120 et seq.

² *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

³ *Hersh v. Ringwalt*, 3 Yeates, 508; 2 Am. Dec. 392; *Hume v. Arrasmith*, 1 Bibb, 165; 4 Am. Dec. 626; *Nye v. Otis*, 8 Mass. 121; 5 Am. Dec. 79; *Wheeler v. Robb*, 1 Blackf. 330; 12 Am. Dec. 245; *Estes v. Antrobus*, 1 Mo. 197; 13 Am. Dec. 496; *Cooper v. Marlow*, 3 Mo. 188; *Purple v. Horton*, 13 Wend. 9; 27 Am. Dec. 167; *Desmond v. Brown*, 29 Iowa, 53; 4 Am. Rep.

194. The plaintiff must prove enough of the identical words laid to amount to the substance of the charge: *Albin v. Parks*, 2 Ill. App. 576. Slanderous words laid as spoken affirmatively are supported by proof that they were spoken in answer to a question: *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43. But proof of slanderous words uttered hypothetically will not sustain an averment of slanderous words uttered absolutely: *Evarts v. Smith*, 19 Mich. 55.

fewer words are proved than are alleged, yet the "words proved must be substantially the same words charged in the petition, — not different words of the same import."¹ But in other states it is not essential that the exact words be proved; proof of words of the same sense and import is sufficient.² A charge that defendant said, "Antrobus took or stole a sufficient quantity of corn to feed two horses out of my crib; he is a thief," is sustained by proof that defendant said Antrobus had come to his house and took his (defendant's) corn out of his crib and fed his horses of nights, and would not open his bells until defendant had gone to bed.³ A charge that "the plaintiff had a bastard child" is sustained by proof of the words "if I have not been misinformed, the plaintiff had a bastard child."⁴ A charge that the defendant called plaintiff a "public whore" is sustained by proof of the words "whorish bitch."⁵ Proof that defendant said to plaintiff,

¹ *Watson v. Musick*, 2 Mo. 29; *Bundy v. Hart*, 46 Mo. 460; 2 Am. Rep. 525; *Berry v. Dryden*, 7 Mo. 334; *Birch v. Benton*, 36 Mo. 153; *Wheeler v. Robb*, 1 Blackf. 330; 12 Am. Dec. 245; *Tucker v. Call*, 45 Ind. 31; *Sanford v. Gaddis*, 15 Ill. 228; *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149; *Williams v. Odell*, 29 Ill. 156; *Smith v. Miles*, 15 Vt. 245; *Smith v. Hollister*, 32 Vt. 695; *Horton v. Reaves*, 2 Murph. 280; *Taylor v. Moran*, 1 Met. (Ky.) 114; *Olmstead v. Miller*, 1 Wend. 506; *Commons v. Walters*, 1 Port. 377; 27 Am. Dec. 635; *Slocumb v. Kuykendall*, 1 Scam. 187; 27 Am. Dec. 764; *Sword v. Martin*, 23 Ill. App. 304; *Brooks v. Dutcher*, 22 Neb. 644.

² *Hersh v. Ringwalt*, 3 Yeates, 508; 2 Am. Dec. 392; *Hume v. Arrasmith*, 1 Bibb, 165; 4 Am. Dec. 626; *Baldwin v. Soule*, 6 Gray 321; *Payson v. Macomber*, 3 Allen, 69; *Robbins v. Fletcher*, 101 Mass. 115; *Chace v. Sherman*, 119 Mass. 387; *Desmond v. Brown*, 29 Iowa, 53; 4 Am. Rep. 194; *McClintock v. Crick*, 4 Iowa, 453; *Bassett v. Spofford*, 11 N. H. 127; *Stevens v. Handly*, *Wright*, 123; *Wilson v. Runyon*, *Wright*, 651; *Williams v. Min*,

18 Conn. 464, the court saying: "The law does not require literal proof of the words as given in the declaration, but only proof of words of the same sense and import. The witness will not be permitted, to give merely his construction of the language used, or the impression which the conversation made upon his mind, without giving the conversation itself. He must state the language used in its connection with the subject of the conversation as near as he can recollect it, and if this does not differ in its essential meaning from the words alleged in the declaration, though it may in the forms of expression, it will sufficiently support the averment. There is nothing more difficult than for a witness to recollect the exact language used by another, and to require this would be to defeat recoveries in actions for verbal slander in almost every instance."

³ *Estes v. Antrobus*, 1 Mo. 197; 13 Am. Dec. 496.

⁴ *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156.

⁵ *Zimmerman v. McMakin*, 22 S. C. 372; 53 Am. Rep. 720.

"Are you not afraid, as you have perjured yourself," sustains an allegation that the former said of the latter, "You are perjured."¹ A general count in a declaration as charging the plaintiff with "stealing" is good.² It is not necessary that the slanderous words be shown to have been spoken on the precise day alleged in the complaint.³

ILLUSTRATIONS. — A passenger-railroad company published that a conductor was discharged for "failing to ring up all fares collected." *Held*, not necessarily to import a charge of embezzlement: *Pittsburgh etc. R. R. Co. v. McCurdy*, 114 Pa. St. 554; 60 Am. Rep. 363. One published of another that he disgraced an office which he had filled; that he had been accused of horse-stealing, had sued his accusers, and the defendants had a verdict. *Held*, that this imputed the crime of grand larceny: *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293.

§ 1244. **Certainty as to Person Defamed — Who may Sue.** — The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. A slander on a class will not give a right of action to any member of that class who will bring the suit.⁴ "If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual."⁵ So where the defendant said to a master, "One of thy servants hath robbed me," it was held that in the absence of special circumstances no one could sue; for it was not apparent who was the person slandered. So where a party in a cause said to three men who had just given evidence against him, "One of you three is perjured," no action lay.⁶ To assert that an acceptance is a forgery is no libel on the drawer, unless it somehow appear that it was he

¹ *Commons v. Walters*, 1 Port. 377; 27 Am. Dec. 635.

² *Nye v. Otis*, 8 Mass. 121; 5 Am. Dec. 79. *Contra*, *Parsons v. Bellows*,

6 N. H. 289; 25 Am. Dec. 461.

³ *Norris v. Elliott*, 39 Cal. 72.

⁴ *Sumner v. Buel*, 12 Johns. 475; *White v. Delavan*, 17 Wend. 50.

⁵ *Eastwood v. Holmes*, 1 Fost. & F. 349; *Solomon v. Lawson*, 8 Q. B. 837.

⁶ *Sir John Bourn's Case*, cited Cro. Eliz. 497.

who was charged with forging it,¹ or to say of the plaintiff "that he or somebody had altered the credit or indorsement on a note from a larger to a less sum, and that the note would speak for itself."² So slander does not lie against one whose name is signed as surety to a note denying the signature and the authority of an agent to sign the note.³ An action for libel brought jointly by the members of a hose company for a newspaper article charging that members of the company, without specifying individuals, had committed a theft, the members not being partners, nor being so situated that the charge could occasion them pecuniary damage as a company, cannot be maintained. Nor can defendants be put to their defense and compelled to disclose to whom the libel referred.⁴ But though the words used appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself.⁵ If the application to a particular individual can be generally perceived, the publication is a libel on him, however general its language may be.⁶ The words "your boys have stolen my corn," spoken to a father, were held actionable *per se* in a suit brought by one of the boys.⁷ So if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding

¹ Stockley v. Clement, 4 Bing. 162; 12 Moore, 376.

² Ingalls v. Allen, 1 Ill. 233.

³ Andrews v. Woodmansee, 15 Wend. 232.

⁴ Giraud v. Beach, 3 E. D. Smith, 337.

⁵ Odgers on Libel and Slander, 129.

⁶ Wakely v. Healey, 7 Com. B. 591;

Le Fanu v. Malcomson, 1 H. L. Cas. 637;

Ryckman v. Delavan, 25 Wend. 186.

"Whether a man is called by one

name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and christian name were ten times repeated": Lord Campbell, C. J., in Le Fanu v. Malcomson, 1 H. L. Cas. 637.

⁷ Maybee v. Fisk, 42 Barb. 326.

circumstances affecting the relation between the parties, and also of any statement or declaration made by the defendant as to the person referred to. The plaintiff may also call at the trial his friends or those acquainted with the circumstances to state that on reading the libel they at once concluded that it was aimed at the plaintiff.¹ So where the plaintiff is referred to by initials or even by asterisks, it is sufficient if those who knew the plaintiff understood him to have been meant.² So a publication which, without naming any one, so refers to certain persons that it is clear that they are intended, may be libelous as to them.³ So one may bring an action for a libel on "A and his friend," and show that the words "his friend" meant the plaintiff.⁴ So, the words "those people upstairs keep a whore-house" give a cause of action to one showing herself to be one of "those people upstairs."⁵ In an action for a libel in which the name of the plaintiff is not mentioned, a subsequent publication by the defendant, in which the plaintiff's name is mentioned, may be introduced in evidence to show that the former publication referred to the plaintiff.⁶ So a person might be indirectly defamed. To charge a man with being a "cuckold" would, it seems, give a right of action to his wife in a jurisdiction where an imputation of want of chastity in a woman was actionable.⁷

¹ *Bourke v. Warren*, 2 Car. & P. 307; *Broome v. Gosden*, 1 Com. B. 728; *Smart v. Blanchard*, 42 N. H. 137; *Mix v. Woodward*, 12 Conn. 262; *Smawley v. Stark*, 9 Ind. 386; *Goodrich v. Davis*, 11 Met. 484; *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768; *Leonard v. Allen*, 11 Cush. 271; *Nelson v. Borchanius*, 52 Ill. 236; *McLaughlin v. Russell*, 17 Ohio, 475; *Tompkins v. Wisener*, 1 Sneed, 458; *Morgan v. Livingston*, 2 Rich. 573; *McCue v. Ferguson*, 73 Pa. St. 333; *Hawks v. Patton*, 18 Ga. 52; 63 Am. Dec. 266; *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 167; *Prosser v. Callis*, 117 Ind. 105. *Contra*, *Gibson v. Williams*, 4 Wend. 330; *Van Vechten*

v. Hopkins, 5 Johns. 211; 4 Am. Dec. 339; *Rangler v. Hummel*, 37 Pa. St. 130.

² *Bourke v. Warren*, 2 Car. & P. 307.

³ *Ryer v. Journal Co.*, 11 Daly, 251.

⁴ *Clark v. Creitzburg*, 4 McCord, 491.

⁵ *Cook v. Rief*, 52 N.Y. Sup. Ct. 302.

⁶ *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 169.

⁷ See *Vicars v. Worth*, 1 Strange, 471; *Hodgkins v. Corbet*, 1 Strange, 545. In an English case the defendant said to the plaintiff's wife, "You are a nuisance to live beside of. You are a bawd, and your house is no better than a bawdy-house." It was held that the plaintiff could maintain the

ILLUSTRATIONS. — The defendant said to his companion, B., "He that goeth before thee is perjured." *Held*, that the plaintiff can sue, if he aver and prove that he was at that moment walking before B.: *Aish v. Gerish*, 1 Roll. Abr. 81. A libel was published on a "diabolical character," who, "like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator." The plaintiff had but one eye, and his name was I'Anson. *Held*, that it was clear that he was the person referred to: *I'Anson v. Stuart*, 1 Term Rep. 748; 2 Smith's Lead. Cas., 6th ed., 57. A newspaper article pronounced the verdict of a jury to be "infamous," and added that "we cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths." *Held*, that an action of libel might be maintained by a member of the jury against the publisher: *Byers v. Martin*, 2 Col. 605; 25 Am. Rep. 755. Two persons were charged in a bill in equity as having fraudulently altered certain instruments, without specifying the person who did it. *Held*, that either of the parties charged might sue: *Forbes v. Johnson*, 11 B. Mon. 48. An action was brought by Louis Fleischmann, a baker and restaurant-keeper in New York City, against a newspaper proprietor for libel. The complaint alleged the defamatory matter to be an article relating to the swill-milk business carried on by Gaff, Fleischmann, & Co. in Queens County, and did not refer to the plaintiff by name or description, nor to his restaurant. *Held*, that a demurrer to the complaint should be sustained: *Fleischmann v. Bennett*, 23 Hun, 200. The defendant in a speech commented severely on the discipline of the Roman Catholic Church, and the degrading punishments imposed on penitents. He read from a paper an account given by three policemen of the severe penance imposed on a poor Irishman. It appeared incidentally from this report that the Irishman had told the policemen that his priest would not administer the sacrament to him till the penance was performed. The plaintiff averred that he was the Irishman's priest, but it did not appear how enjoining such a penance on an Irishman would affect the character of a Roman Catholic

action without joining his wife, and without proving special damage; because if in fact his wife did keep a bawdy-house, the plaintiff could be indicted for it": *Huckle v. Reynolds*, 7 Com. B., N. S., 114. Courts will not allow two persons to litigate a suit for libel, the libel consisting in an attack upon the chastity of a third person not a party: *Loughead v.*

Bartholomew, Wright, 90. The words "all the bravery you ever showed was in sleeping with your sisters" will not support an action for slander by one of the unmarried sisters of the person to whom they were addressed, without proof of extrinsic facts to show that the speaker meant to charge sexual intercourse with such sisters: *Millison v. Sutton*, 1 Ind. 508.

priest. The alleged libel was in no other way connected with the plaintiff. *Held*, no libel; and no slander of plaintiff: *Hearne v. Stowell*, 12 Ad. & E. 719; 6 Jur. 458; 4 Perry & D. 696. The declaration in an action for libel alleged in the first count that the defendant falsely and maliciously accused the plaintiff of conspiring with P. to defraud the neighbors and friends of the plaintiff and P.; and that the defendant caused said false and malicious libel to be published in a certain newspaper, as follows: "As to the E. company, I doubt not all are willing that it should pay a fair dividend, six per cent, even ten per cent, on the actual value of the plant. Here comes the rub; when the N. company was capitalized for forty thousand dollars, its actual value was not fifteen thousand dollars. It was a plan for the T. company to make a good sale, as no profit could be made with the sharp, bitter competition of the S. company in the field, and it was a scheme by which certain parties [meaning the plaintiff and said P.] attempted to make twenty thousand dollars or more by buying a property worth in the neighborhood of fifteen thousand dollars and capitalizing it for forty thousand dollars, and by selling stock to their neighbors and friends [meaning the neighbors and friends of the plaintiff and said P.] which was more than half water [meaning that more than half of the par value of said stock represented no assets, and was of no real value]. In fact, the T. plant at the time it was sold and capitalized for forty thousand dollars was not worth near fifteen thousand dollars, as a large sacrifice had to be made, and was made, by the projectors [meaning the plaintiff and said P.], who dare not force the loss of removing the S. competition on the stockholders after making one hundred per cent and more on the stock sold." The second count alleged that the plaintiff was engaged in business in the city in which the newspaper was published; and that the defendant caused to be published in said newspaper "a false and malicious libel concerning the plaintiff, whereby the plaintiff was greatly injured in his trade, business, and employment"; and set out the publication annexed to the first count. *Held*, on demurrer, that the declaration was insufficient, in failing to apply the alleged libelous words to the plaintiff, or to show in what sense they were used: *McCallum v. Lambie*, 145 Mass. 234.

CHAPTER LXV.

SLANDER.

- § 1245. Slander in general.
- § 1246. Words imputing indictable offense.
- § 1247. Words imputing contagious disease.
- § 1248. Slander in one's calling or office.
- § 1249. Office or calling may be of any kind.
- § 1250. Illegal occupations.
- § 1251. Past holding or pursuit insufficient.
- § 1252. Words actionable where calling or office is slandered.
- § 1253. In general.
- § 1254. Attorneys.
- § 1255. Clergymen.
- § 1256. Mechanics and workmen.
- § 1257. Merchants and traders.
- § 1258. Officers.
- § 1259. Physicians and surgeons.
- § 1260. *Aliter* where only general reputation is attacked.
- § 1261. Act referred to must be of or incident to plaintiff's calling.
- § 1262. And must be applied thereto.
- § 1263. Charge as to particular transaction not actionable — Exceptions.
- § 1264. Comparisons as to merits not actionable.
- § 1265. Other words not actionable except in case of special damage.

§ 1245. **Slander — In General.** — Slander, i. e., oral defamation, is actionable in three cases only, unless special damage is proved.¹ The three cases in which a slander is

¹ The reasons that the law distinguishes between slanderous words and written defamation are summed up by an English author as follows: "*Vox emissa volat; litera scripta manet.*" The written or printed matter is permanent, and no one can tell into whose hand it may come. Every one now can read. The circulation of a newspaper is enormous, especially if it be known to contain libelous matter. And even a private letter may turn up in after years, and reach persons for whom it was never intended, and so do incalculable mischief. Whereas a slander only reaches the immediate by-standers, who can observe the manner and

note the tone of the speaker, — who have heard the antecedent conversation, which may greatly qualify his assertion, — who probably are acquainted with the speaker, and know what value is to be attached to any charge made by him; the mischief is thus much less in extent, and the publicity less durable. 2. A slander may be uttered in the heat of a moment, and under a sudden provocation; the reduction into writing and the publication of a libel show greater deliberation and malice. 3. A third reason is sometimes given, that a libel is more likely to lead to a breach of the peace. But I doubt if this is so. A man would be more tempted to personally

actionable *per se*, i. e., in which from the mere utterance of the words the court will presume some damage to have been suffered by the plaintiff, are: 1. Where the words charge the plaintiff with the commission of some indictable offense; or 2. Impute to him a contagious or infectious disease tending to exclude him from society; or 3. Are spoken of him in the way of his office, profession, or trade. In no other case are spoken words defamatory, unless they have caused some special damage to the plaintiff.

§ 1246. **Words Imputing Indictable Offense.**—Spoken words, which impute that the plaintiff has been guilty of an indictable offense involving moral turpitude or subjecting him to an infamous punishment are actionable without proof of special damage.¹

chastise a villain who slandered him to his face than a libeler who lampooned him in the papers. Even if it were so, it would tend to explain why libel is a crime and slander not, rather than to account for the distinction just pointed out between the evidence required in the respective civil actions. For this is a further important difference between slander and libel: that for every libel criminal proceedings may be taken by way of information or indictment, if the person defamed does not desire damages; whereas a slander, unless it be blasphemous, seditious, or obscene, is not criminal at all": *Odgers on Libel and Slander*, 3.

¹ *Pollard v. Lyon*, 91 U. S. 225; *Brooker v. Coffin*, 5 Johns. 188; 4 Am. Dec. 337; *Anonymous*, 60 N. Y. 263; 19 Am. Rep. 174; *Miller v. Parrish*, 8 Pick. 384; *McCuen v. Ludlum*, 17 N. J. L. 12; *Johnson v. Shields*, 25 N. J. L. 116; *Gosling v. Morgan*, 32 Pa. St. 273; *Klumph v. Dunn*, 66 Pa. St. 141; 5 Am. Rep. 355; *Perdue v. Burnett*, Minor, 138; *Montgomery v. Deeley*, 3 Wis. 709; *Stitzell v. Reynolds*, 67 Pa. St. 54; 56 Am. Rep. 390; *Hoag v. Hatch*, 23 Conn. 585; *Ranger v. Goodrich*, 17 Wis. 80; *Filber v. Dautermann*, 26 Wis. 518; *Hollingsworth v. Shaw*, 19 Ohio St. 430; 2 Am. Rep. 411;

Davis v. Brown, 27 Ohio St. 326; *Young v. Miller*, 3 Hill, 21; *Martin v. Stillwell*, 13 Johns. 275; 7 Am. Dec. 374; *Widrig v. Oyer*, 13 Johns. 124; *Case v. Buckley*, 15 Wend. 327; *Bissell v. Cornell*, 24 Wend. 354; *Crawford v. Wilson*, 4 Barb. 504; *Hillhouse v. Peck*, 2 Stew. & P. 395; *Johnston v. Morrow*, 9 Port. 525; *Dudley v. Horn*, 21 Ala. 379; *Heath v. Devaughn*, 37 Ala. 677; *Berdeaux v. Davis*, 58 Ala. 611; *Giddens v. Mirk*, 4 Ga. 364; *Taylor v. Kneeland*, 1 Doug. (Mich.) 68; *Gage v. Shelton*, 3 Rich. 242; *Burton v. Burton*, 3 G. Greene, 316; *Brite v. Gill*, 2 T. B. Mon. 65; 15 Am. Dec. 122; *Demarest v. Haring*, 6 Cow. 76; *McKee v. Wilson*, 87 N. C. 300; *Page v. Merwin*, 54 Conn. 426. By "infamous punishment" in this connection does not mean a punishment which subjects the criminal after he has served it out to permanent civil disabilities as is the ordinary meaning: See *Bouv. Dict.* In this section it means corporal punishment, e. g., imprisonment, and this either in the penitentiary or in a common jail or house of correction: *Wilcox v. Edwards*, 5 Blackf. 183; *Rammel v. Otis*, 60 Mo. 365; *Bush v. Benton*, 26 Mo. 153; *Billings v. Wing*, 7 Vt. 439; *Griffin v. Moore*, 43 Md. 246; *Elliot v. Ashbury*, 2 Bibb, 473; 5 Am. Dec. 631.

This principle is maintained by a great majority of the decisions, though in some cases it has not been adhered to. Thus in Vermont it has been held that, in order to render the charge actionable *per se*, the act imputed shall not only be subject to an infamous punishment, but also involve moral turpitude.¹ In Massachusetts it has been held actionable to charge a person with an offense that may subject him to a punishment which will bring disgrace on him, though the punishment be not infamous.² In Minnesota it is said that if the words charge a crime punishable criminally by indictment they are actionable.³ In Missouri and Maryland the crime must be indictable and punishable corporally, and not by a fine or imprisonment in default of a money payment.⁴ In Kentucky words that charge merely an offense punishable by fine and imprisonment are actionable *per se*.⁵ And in several states it is provided by statute what words shall be actionable *per se*.⁶

It is actionable, therefore (under the general rule at the beginning of this section), to charge a man with the commission of such a specific crime or offense as altering marks on animals,⁷ assault with intent to rob,⁸ attempting to corrupt a jury,⁹ attempt to murder,¹⁰ arson,¹¹ attempt

¹ Redway v. Gray, 31 Vt. 292. See mell v. Otis, 60 Mo. 365; Griffin v. Kimmis v. Stiles, 44 Vt. 351. Moore, 43 Md. 246.

² Miller v. Parish, 8 Pick. 384; Buckley v. O'Neil, 113 Mass. 193; 18 Am. Rep. 466. Therefore in that commonwealth to charge a woman with being a common drunkard (punishable by confinement in the house of correction), or that she was drunk in a single instance (punishable by a fine of five dollars), is actionable, "for the punishment of a woman for either offense must bring disgrace on her": Brown v. Nickerson, 5 Gray, 1.

³ St. Martin v. Desnoyer, 1 Minn. 156; 61 Am. Dec. 494; McCarthy v. Barrett, 12 Minn. 494. And see Estes v. Carter, 10 Iowa, 400, and Lucas v. Flinn, 35 Iowa, 9, where the same rule seems to be laid down.

⁴ Birch v. Benton, 26 Mo. 153; Ram-
mell v. Otis, 60 Mo. 365; Griffin v. Moore, 43 Md. 246.
⁵ Lemons v. Wells, 78 Ky. 117.
⁶ Arkansas, California, Georgia, Florida, Illinois, Indiana, Mississippi, Missouri, and North Carolina.
⁷ Perdue v. Burnell, Minor, 138. But see Johnston v. Morrow, 9 Port. 525.
⁸ Lewkuor v. Cruchley, Cro. Car. 140.
⁹ Gibbs v. Dewey, 5 Cow. 503.
¹⁰ Scott v. Hilliar, Lane, 98; 1 Vin. Abr. 440; Preston v. Pinder, Cro. Eliz. 308.
¹¹ Waters v. Jones, 3 Port. 442; 29 Am. Dec. 261; Wallace v. Young, 5 T. B. Mon. 155; House v. House, 5 Har. & J. 125; Gage v. Shelton, 3 Rich. 342. As to say of a person, "I can prove that J. burnt the gin-house of C., by H.," or that "J. was in a condition

to rob¹ or commit larceny,² being an "abortionist,"³ bigamy,⁴ burglary,⁵ bribery and corruption,⁶ burning a cotton-house,⁷ conspiracy,⁸ counterfeiting,⁹ demanding money with menaces,¹⁰ embezzlement,¹¹ embracery,¹² false pretenses,¹³ forgery,¹⁴ giving medicine to produce an abortion,¹⁵ homicide generally,¹⁶ indecent exposure,¹⁷ keeping a house of ill-fame,¹⁸ keeping a gaming-house,¹⁹ kidnaping,²⁰ libel,²¹ larceny,²² passing counterfeit

about the gin-house, previous to the burning of it, which caused every person in the settlement to believe J. did burn the house": *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261. Or to say of another, "I believe A. burnt the camp-ground": *Giddens v. Mirk*, 4 Ga. 364. Or, "I have every reason to believe he burnt the barn," and "I believe he burnt the barn": *Logan v. Steele*, 1 Bibb, 593; 4 Am. Dec. 659. Or, he "sent two loads of his store goods to the Black Hills with his mule teams, and started a store there, and then set fire to and burned his store building to get the insurance": *West v. Hanrahan*, 28 Minn. 385.

¹ *Crofts v. Brown*, 3 Bulst. 167.

² *Berdeaux v. Davis*, 58 Ala. 611.

³ *De Pew v. Robinson*, 95 Ind. 109.

⁴ *Heming v. Power*, 10 Mees. & W. 564; *Delany v. Jones*, 4 Esp. 190.

⁵ *Somers v. House*, Holt, 39.

⁶ *Bendish v. Lindsey*, 11 Mod. 194; *Hoag v. Hatch*, 23 Conn. 585.

⁷ *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261.

⁸ *Tibbott v. Haynes*, Cro. Eliz. 191.

⁹ *Thirman v. Matthews*, 1 Stew. 384.

¹⁰ *Neve v. Cross*, Style, 350.

¹¹ *Williams v. Stott*, 1 Cramp. & M. 675; 3 Tyrw. 688.

¹² *Gibbs v. Dewey*, 5 Cow. 503.

¹³ As, "You had better go to T. and pay him back the twenty dollars you got from him by false pretenses": *La-follett v. McCarthy*, 18 Ill. App. 87.

¹⁴ *Arnold v. Cost*, 3 Gill & J. 219; 22 Am. Dec. 302; *Gay v. Homer*, 13 Pick. 535; *Ricks v. Cooper*, 3 Hawks, 587. As forging a petition to the legislature: *Alexander v. Alexander*, 9 Wend. 141; or a deposition: *Atkinson v. Reding*, 5 Blackf. 39.

¹⁵ *Fibler v. Daunterman*, 26 Wis. 518.

¹⁶ *Taylor v. Casey*, Minor, 258; *Harrison v. Findley*, 23 Ind. 265; 85 Am. Dec. 456; *Sugart v. Carter*, 1 Dev. & B. 8; *Eckart v. Wilson*, 10 Serg. & R. 44; *Montgomery v. Desley*, 3 Wis. 709; *O'Connor v. O'Connor*, 24 Ind. 418.

¹⁷ *Seller v. Jenkins*, 97 Ind. 430.

¹⁸ *Huckle v. Reynolds*, 7 Com. B., N. S., 114; *Martin v. Stillwell*, 13 Johns. 275; 7 Am. Dec. 374; *Wright v. Paige*, 36 Barb. 438; *Lipprant v. Lipprant*, 52 Ind. 273.

¹⁹ As to say of one, "He makes his money easy; he keeps a gambling-place"; or to say of him, "He makes his money easy; he keeps a gambling-hell": *Buckley v. O'Neil*, 113 Mass. 193; 18 Am. Rep. 466.

²⁰ *Nash v. Benedict*, 25 Wend. 645.

²¹ *Andres v. Koppenheaver*, 3 Serg. & R. 255; 8 Am. Dec. 647; *Viele v. Gray*, 10 Abb. Pr. 1.

²² *Foster v. Browning*, Cro. Jac. 688; *Baker v. Pierce*, 2 Ld. Raym. 959; *Slowman v. Dutton*, 10 Bing. 402; *Tomlinson v. Brittlebank*, 4 Barn. & Adol. 630; 1 Nev. & M. 455; *Gaul v. Fleming*, 10 Ind. 253; *Dudley v. Robinson*, 2 Ired. 141; *Bornman v. Boyer*, 3 Binn. 515; 5 Am. Dec. 380; *Van Aiken v. Carter*, 48 Barb. 58; *Shipp v. McCraw*, 3 Murph. 463; *Hume v. Arrasmith*, 1 Bibb, 165; 4 Am. Dec. 626; *Harman v. Cundiff*, 82 Va. 239; *Stumer v. Pitchman*, 22 Ill. App. 399; 124 Ill. 250. As stealing the boots from a dead body cast ashore: *Wonson v. Sayward*, 13 Pick. 402; 23 Am. Dec. 691. Charging the plaintiff, as postmaster, with taking money out of a letter put into the office by the defendant, and appropriating it to his own use, with keeping and embezzling letters, etc.; *Hays v. Allen*, 2 Blackf. 408. A

money,¹ letting a house for lewd purposes,² mailing indecent and immoral matter,³ murder,⁴ manslaughter,⁵

partner charging his copartner with "pilfering" out of the store: *Becket v. Sterrett*, 4 Blackf. 499. Charging the plaintiff with having robbed the United States mail: *Jones v. Chapman*, 5 Blackf. 88. Charging one with being a thieving person, or saying of him that he stole, and ran away: *Alley v. Neely*, 5 Blackf. 200. "He stole my corn": *Haag v. Cooley*, 33 Kan. 387. "He is a thief; he stole my wheat, and ground it, and sold the flour to the Indians": *Parker v. Lewis*, 2 G. Greene, 311. "He has stolen boards": *Burbank v. Horn*, 39 Me. 233. "There is the man who stole my horse and fetched him home this morning": *Bonner v. Boyd*, 3 Har. & J. 278. "I will venture anything he has stolen my book": *Nye v. Otis*, 8 Mass. 122; 5 Am. Dec. 79. "J. H. stole corn, and I can prove it; he is a rogue, and not fit to keep a mill." "He stole corn, and I can prove it. I have sent my corn to his mill, and weighed it before I sent it, and weighed it on its return, and it was lacking": *Hume v. Arrasmith*, 1 Bibb, 165; 4 Am. Dec. 626. "I saw the plaintiff take corn from A's crib twice, and look around to see if any person saw him measuring": *Jones v. McDowell*, 4 Bibb, 188. Charging one who has the care of goods with stealing them: *Gill v. Bright*, 6 T. B. Mon. 130. "He is a hog-thief": *Hogg v. Wilson*, 1 Nott & McC. 216. Charging one with having stolen cotton, even if the charge was made in allusion to cotton which the plaintiff had to gin for the defendant's brother: *Stokes v. Stuckey*, 1 McCord, 562. Calling a person "a bloody thief": *Fisher v. Rotereau*, 2 McCord, 189. Saying of another person, "tell him he is riding a stolen horse, and has a stolen watch in his pocket": *Davis v. Johnston*, 2 Bail. 579. "You get your living by sneaking about when other people are asleep"; "What did you do

with the sheep you killed?" "Did you eat it?" "It was like the beef you got negroes to bring you at night"; "Where did you get the little wild shoats you always have in your pen?" "You are an infernal roguish rascal": *Morgan v. Livingston*, 2 Rich. 573. "He went to Gray's shop for a watch; demanded a gold watch; Gray told him to take it; he did so; the owner came for the watch; Gray sent word to him to send it back, which he did. If that be not stealing, what do you call it?" *Mayson v. Sheppard*, 12 Rich. 254. Charging a person with having received a letter containing money, to deliver to another; that he gave himself a false name at the time, and that, instead of delivering the letter, he broke it open and used the money: *Cheadle v. Buell*, 6 Ohio, 67. "My watch has been stolen in M.'s bar-room, and I have reason to believe that T. took it, and that her mother concealed it": *Miller v. Miller*, 8 Johns. 74, 77. "You will steal": *Cornelius v. Van Slyck*, 21 Wend. 70. "She has stolen tea, etc., and carried it away home": *Coleman v. Playsted*, 36 Barb. 26. "You are a God damned, lying, thieving son of a bitch": *Reynolds v. Ross*, 42 Ind. 387. "You are a God damned liar and a thief, and I can prove it": *McGregor v. Eakin*, 3 Ill. App. 340. "These books [meaning the firm books of the parties] must be in court. For he is a swindler and thief, and stole \$8,000 from me": *Stern v. Katz*, 38 Wis. 136. "He stole my dog": *Harrington v. Miles*, 11 Kan. 480; 15 Am. Rep. 355. To charge that plaintiff "stole and destroyed my sister's will and other papers" is slanderous; the Penal Code of New York, section 110, declaring that one who, knowing that a paper may be required in evidence, willfully destroys it to prevent its production, is guilty of a misdemeanor; and sections 528 and 718, making any

¹ But the charge must be that the plaintiff knew it was counterfeit: *Christ v. Bridgman*, 6 Mo. 190.

² Where such act is by statute a crime: *Halley v. Gregg*, 74 Iowa, 163.

³ *Halstead v. Nelson*, 36 Hun, 149.

⁴ *Peake v. Oldham*, Cowp. 275; *sub. nom.* *Oldham v. Peake*, 2 W. Black. 959; *Button v. Heyward*, 8 Mod. 24.

⁵ *Ford v. Primrose*, 5 Dowl. & R. 287; *Edsall v. Russell*, 4 Man. & G. 1090; 5 Scott N. R. 801.

perjury,¹ receiving stolen goods knowing them to have been stolen,² robbery,³ removing land-marks,⁴ secreting

article of value, contract, thing in action, or written instrument, by which any pecuniary obligation or interest in property is created, transferred, increased, diminished, etc., the subject of larceny. The charge imputing theft will be presumed to have been made in reference to papers that may be the subject of larceny: *Collyer v. Collyer*, N. Y. Sup. Ct., 1889.

But the following have been held not actionable: To say of a treasurer of a Masonic lodge: "He has robbed the treasury of a sum of money, and bought a farm with it": *Allen v. Hillman*, 12 Pick. 101; to charge a weaver with stealing filling sent to his house to be woven into cloth: *Hawn v. Smith*, 4 B. Mon. 385; or the words, "Uncle Daniel must settle for some of my logs he has made away with": *Brown v. Brown*, 14 Me. 317; charging one with having stolen a "bee-tree": *Cock v. Weatherby*, 5 Smedes & M. 333; "A man that would do that would steal": *Stees v. Kemble*, 27 Pa. St. 112; "She took tea, etc., from her, and she found them in her things"; also, "She had taken tea and calico, and I think she said sugar": *Coleman v. Playsted*, 36 Barb. 26; "You have stolen a file of bills out of my desk": *Blanchard v. Fisk*, 2 N. H. 398; "J. O. has stolen my marle"; "You are a thief; you have stolen my marle": *Ogden v. Riley*, 14 N. J. L. 186; 25 Am. Dec. 513; "You as good as stole the canoe of J. H.": *Stokes v. Arey*, 8 Jones, 66; "You stole my money; yes, you kept my money": *Taylor v. Short*, 40 Ind. 506; "You are a cheat and a swindler, and you defrauded me": *Lucas v. Flinn*, 35 Iowa, 9.

¹ *Hutts v. Hutts*, 62 Ind. 214; *Zimmerman v. McMakin*, 22 S. C. 372; 53 Am. Rep. 720; *Chapman v. Gillet*, 2 Conn. 40; *Gibbs v. Tucker*, 2 A. K. Marsh. 219; *Canterbury v. Hill*, 4 Stew. & P. 224; *Harris v. Purdy*, 1 Stew. 231; *Holt v. Scholefield*, 6 Term Rep. 691; *Moore v. Homer*, 4 Sneed, 491;

Gilman v. Lowell, 8 Wend. 573; 24 Am. Dec. 96; *Commons v. Walters*, 1 Port. 377; 27 Am. Dec. 635; *Lea v. Robertson*, 1 Stew. 138; *Carlock v. Spencer*, 7 Ark. 12; *Eccles v. Shannon*, 4 Harr. (Del.) 193; *Newbit v. Statuck*, 35 Me. 315; 58 Am. Dec. 706; *Rinehardt v. Potts*, 7 Ired. L. 403; as, "You have taken a false oath before Squire R.": *Rue v. Mitchell*, 2 Dall. 58; 1 Am. Dec. 258; "You swore to a lie, for which you now stand indicted": *Pelton v. Ward*, 3 Caines, 73; 2 Am. Dec. 251; "That is false," to a witness testifying in court: *McLaughry v. Wetmore*, 6 Johns. 82; 5 Am. Dec. 194; *Mower v. Watson*, 11 Vt. 536; 34 Am. Dec. 704; "You swore false at the trial of your brother": *Fowle v. Robbins*, 12 Mass. 498; "He swore to a damned lie, and I will put him through": *Crone v. Angell*, 14 Mich. 340; "You swore to a lie before the grand jury": *Perselly v. Bacon*, 20 Mo. 330; "He is perjured": *Hopkins v. Beedle*, 1 Caines, 347; 2 Am. Dec. 191; "He swore falsely, and I will attend to the grand jury respecting it": *Gilman v. Lowell*, 8 Wend. 573; "He [the plaintiff] has sworn to a lie, and done it meaningly, to cut my throat": *Coons v. Robinson*, 3 Barb. 625; "I would not swear to what C. has for the town or the county. P. is honestly mistaken, but C. is willful": *Walrath v. Nellis*, 17 How. Pr. 72; "I had a lawsuit with A, and B swore falsely against me, and I have advertised him, as such": *Magee v. Stark*, 1 Humph. 506; "The Rev. Thomas Smith is a perjured man": *Cummin v. Smith*, 2 Serg. & R. 440; saying to a witness who has just given his testimony in a justice's court, "You have sworn a manifest lie": *Kean v. McLaughlin*, 2 Serg. & R. 469; "He has perjured himself; he swore lies before the court at Madison, according to the church-book": *Brown v. Hanson*, 53 Ga. 632.

But not that he is forsworn: *Hopkins v. Beedle*, 1 Caines, 347; 2 Am.

² *Alfred v. Finlow*, 8 Q. B. 854.

³ *Rowcliffe v. Edmonds*, 7 Mees. & W. 12.

⁴ *Todd v. Rough*, 1 Serg. & R. 18; *Young v. Miller*, 3 Hill, 24; *Dial v. Holter*, 6 Ohio St. 228.

testator's goods as administrator,¹ smuggling,² soliciting to commit a crime,³ subornation of perjury,⁴ treason,⁵ unnatural offenses,⁶ vagrancy.⁷

So where the words imply a felony, though no specific crime is charged, they are actionable;⁸ as, for example, the following: "If you had had your deserts, you would have been hanged before now";⁹ "He deserves to have his ears nailed to the pillory";¹⁰ "You have committed an act for which I can transport you";¹¹ "You have done many things for which you ought to be hanged, and I will have you hanged";¹² "I know enough that he has done to send him to the penitentiary";¹³ "He was once accused of steal-

Dec. 191; *Ward v. Clark*, 2 Johns. 10; 3 Am. Dec. 383; *Sheely v. Biggs*, 2 Har. & J. 363; 3 Am. Dec. 552; or made false affidavits: *Casselman v. Winship*, 3 Dak. 292; or that he swore to a lie, there being no reference to any judicial proceedings, or any oath which would be the subject of perjury: *Shinloub v. Ammerman*, 7 Ind. 347; *Mebane v. Sellars*, 3 Jones, 199; *Watson v. Hampton*, 2 Bibb, 319; *Martin v. Melton*, 4 Bibb, 99; *Vaughan v. Havens*, 8 Johns. 109; *Crookshank v. Gray*, 20 Johns. 344; *Bonner v. McPhail*, 31 Barb. 106; *Packer v. Spangler*, 2 Binn. 60; *Barger v. Barger*, 18 Pa. St. 489; *Roella v. Follow*, 7 Blackf. 377; *Shaffer v. Kintzer*, 1 Binn. 537; 2 Am. Dec. 488; *Power v. Miller*, 2 McCord, 220; *Kimmis v. Stiles*, 44 Vt. 351; *Small v. Clewley*, 60 Me. 262; or that one has falsely taken an oath prescribed by an unconstitutional and void act of the legislature: *Burkett v. McCarty*, 10 Bush, 758; "If I had sworn to what you did, I would have sworn to a lie": *Beswick v. Chappel*, 8 B. Mon. 486; "He swore to a damned lie, but I am not liable, because I have not said in what suit he testified": *Muchler v. Mulhollen*, Hill & D. 263; "He swore a lie before the church sessions, and I can prove it": *Harvey v. Boies*, 1 Pen. & W. 12; "He has sworn falsely in the case with my brother"; *Schmidt v. Witherick*, 29 Minn. 156. Where the words charged were: "Old C. is a hog-thief; I have been keeping him

in hog-meat for twenty years; he has always kept a set of thieves and liars about him to steal for him and swear for him; they will swear a man to hell,"—it was held that the allegations as to keeping C. in meat, and as to swearing a man to hell, and as to C.'s keeping liars to swear for him, were not actionable; otherwise, those as to C.'s being a thief, and keeping thieves to steal for him: *Porter v. Choen*, 60 Ind. 338.

¹ *Beck v. Stitzel*, 21 Pa. St. 522.

² *Stilwell v. Barter*, 19 Wend. 487.

³ *Leversage v. Smith*, Cro. Eliz. 710; *Tibbott v. Haynes*, Cro. Eliz. 191.

⁴ *Harrison v. Thornborough*, 10 Mod. 186.

⁵ *Fry v. Carne*, 8 Mod. 283; *Stapleton v. Frier*, Cro. Eliz. 251.

⁶ *Woolnorh v. Meadows*, 5 East, 463; *Colman v. Godwin*, 3 Doug. 90.

⁷ Where it is punishable by fine and imprisonment: *Miles v. Oldfield*, 4 Yeates, 423; 2 Am. Dec. 412.

⁸ *Thompson v. Lusk*, 2 Watts, 17; 26 Am. Dec. 91; *Gorham v. Ives*, 2 Wend. 534; *Sewoll v. Catlin*, 3 Wend. 291; *Gibson v. Williams*, 4 Wend. 320; *Morgan v. Livingston*, 2 Rich. 573.

⁹ *Donne's Case*, Cro. Eliz. 62.

¹⁰ *Jenkinson v. Mayne*, Cro. Eliz. 384; 1 Vin. Abr. 415.

¹¹ *Curtis v. Curtis*, 10 Bing. 477; 3 Moore & S. 819; 4 Moore & S. 337.

¹² *Francis v. Roose*, 3 Mees. & W. 191; 1 Hurl. & H. 36.

¹³ *Johnson v. Shields*, 25 N. J. L. 116.

ing a horse; he sued the accusers, and at the trial a verdict was brought in for the defendants";¹ "He is a thief";² "I believe he burnt the barn";³ "He would venture anything the plaintiff has stolen N.'s book";⁴ "I have made the charge against him, and I will go on with it";⁵ "You have stolen my belt";⁶ "He is a thieving puppy";⁷ "You have been cropped for felony";⁸ that "he is a rogue and villain; that he had ruined many families, and that the curses of widows and children were on him; that he had wronged the defendant's father's estate, and cheated the defendant's brother T.";⁹ calling one a "hoary-headed filcher";¹⁰ saying, "I have lost a calf-skin out of my cellar the day that you and Bornman got the leather, and there was nobody in the cellar but you, Bornman, and Gray; and I do not blame you nor Gray, but Bornman must have taken it."¹¹

So where the words impute the past commission of a crime, they are actionable; and it is not necessary that they should accuse the plaintiff of a crime which would cause his arrest.¹² Thus it is actionable to call a man a "returned convict";¹³ or to say that he is a thief or felon,

¹ *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293.

² *Quigley v. McKee*, 12 Or. 22; 53 Am. Rep. 320; *Salem v. Angell*, 46 Vt. 740.

³ *Logan v. Steele*, 1 Bibb, 593; 4 Am. Dec. 659.

⁴ *Nye v. Otis*, 8 Mass. 121; 5 Am. Dec. 79.

⁵ *Thompson v. Lusk*, 2 Watts, 17; 26 Am. Dec. 91.

⁶ *St. Martin v. Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494.

⁷ *Little v. Barlow*, 26 Ga. 423; 71 Am. Dec. 219.

⁸ *Wiley v. Campbell*, 5 T. B. Mon. 396.

⁹ *Marshall v. Addison*, 4 Har. & McH. 537.

¹⁰ *Crocker v. Hadley*, 102 Ind. 416.

¹¹ *Bornman v. Boyer*, 3 Binn. 515; 5 Am. Dec. 380.

¹² "The charge of criminal conduct

for which punishment has been inflicted, or which has been pardoned, or a prosecution for which is barred by the statute of limitations, will support an action under corresponding circumstances to those which support one where the charge, if true, would still subject the party to punishment. It is not, therefore, the danger that might follow from the charge, but the disgrace of the scandal, that constitutes the injury": *Cooley on Torts*, 200; *Carpenter v. Tarrant*, Cas. t. Hardw. 339; *Smith v. Stewart*, 5 Pa. St. 372; *Holley v. Burgess*, 9 Ala. 728; *Van Ankin v. Westfall*, 14 Johns. 233; *Krebs v. Oliver*, 12 Gray, 239; *Shipp v. McCraw*, 3 Murph. 463; 9 Am. Dec. 611; *Brewer v. Weakley*, 2 Over. 99; 5 Am. Dec. 656.

¹³ *Fowler v. Dowdney*, 2 Moody & R. 119.

even though he has been convicted of a crime, and has been pardoned;¹ or that he has been in the penitentiary;² or that he has been imprisoned for larceny in a foreign country.³ A child too young to be punishable for a crime may nevertheless maintain an action for slander in charging him with it.⁴ But words amounting to a charge that the plaintiff had committed a penitentiary offense, but that he was insane when he committed it, are not actionable.⁵

If the offense imputed be not indictable, but only punishable summarily before a magistrate by penalty or fine, and does not impute moral turpitude, the words will not be actionable *per se*.⁶ So if merely fraud, dishonesty, immorality, or vice be imputed, no action lies without proof of special damage.⁷ Therefore, for this reason it is not actionable *per se* to call a man, or to charge him with being, a "bogus peddler,"⁸ a cheat,⁹ a rogue or rascal;¹⁰ or with opening and reading a letter;¹¹ selling personal property by wife of joint owner;¹² taking away standing corn;¹³ calling a person a "God damned rogue";¹⁴ saying to a white man, "Negroes have been with your wife; I can prove it";¹⁵ "He killed and salted one of my hogs";¹⁶ calling a man a "damned rogue";¹⁷ charging

¹ Leyman v. Latimer, L. R. 3 Ex. Div. 15, 352.

² Smith v. Stewart, 5 Pa. St. 372.

³ Krebs v. Oliver, 12 Gray, 239.

⁴ Stewart v. Howe, 17 Ill. 71.

⁵ Abrams v. Smith, 8 Blackf. 95.

⁶ See *ante*.

⁷ Even a charge of "sodomy," that crime not being indictable in the jurisdiction, is not actionable *per se*: Melvin v. Weiant, 36 Ohio St. 184; 38 Am. Rep. 572; or the crime against nature: Coburn v. Harwood, Minor, 93; 12 Am. Dec. 37; or incest: Eure v. Odom, 2 Hawks, 52. But in some states a charge of immorality would seem to be actionable: Walton v. Singleton, 7 Serg. & R. 451; 10 Am. Dec. 472.

⁸ Pike v. Van Wormer, 5 How. Pr. 171; 6 How. Pr. 99.

⁹ Savage v. Robeny, 2 Salk. 694; Pollock v. Hastings, 88 Ind. 248.

¹⁰ Stanhope v. Blith, 4 Rep. 15. As, "You are a rogue, and your mother has upheld you in stealing, from your cradle up": McCurry v. McCurry, 82 N. C. 296. "You are a rogue, and I can prove that you cheated M. S. out of one hundred dollars": Winter v. Sumvalt, 3 Har. & J. 38.

¹¹ McCuen v. Ludlum, 17 N. J. L. 12; Hillhouse v. Peck, 2 Stew. & P. 395.

¹² Rodgers v. Rodgers, 11 Heisk, 757.

¹³ Stitzell v. Reynolds, 59 Pa. St. 488.

¹⁴ Ford v. Johnson, 21 Ga. 399.

¹⁵ Castleberry v. Kelly, 26 Ga. 606.

¹⁶ Clay v. Barkley, Snead, 79.

¹⁷ Caldwell v. Abby, Hardin, 529.

one with being a liar;¹ saying of the plaintiff "that he got drunk on Christmas";² calling another a "bushwhacker";³ saying of a woman, "She was hired to swear a child on me; she has had a child before this, when she went to Canada; she would come damned near going to state prison";⁴ calling a person a "swindler";⁵ saying of a person, "He was a rogue, and kept at home a rogue-hole, and harbored rogues";⁶ imputing to a female a wanton and lascivious disposition only;⁷ charging a person to be a mulatto, and "akin to negroes";⁸ telling the plaintiff, "You had a share in breaking into the store,"—alleged to refer to a robbery of a store belonging to the plaintiff and defendant as copartners;⁹ charging the plaintiff with having cut off the tail of the defendant's horse;¹⁰ charging a person with the intemperate use of spirituous liquors;¹¹ charging that one burnt, destroyed, and suppressed a will;¹² saying, "F. had a child whilst she was at K.'s pretending to weave a piece of cloth; she lay abed nearly all the time she was pretending to weave her cloth, and had her baby, a large baby, and K. had her cloth woven for her";¹³ charging that the plaintiff had poisoned the defendant's horse,¹⁴ or with purchasing liquor,¹⁵ or being a "deserter,"¹⁶ or charging one with being in a suspicious place under suspicious circumstances;¹⁷ or charging, "You have took my money, and have it";¹⁸ or saying, "A got drunk, and came home with some powders, and tried to get his

¹ *Smalley v. Anderson*, 4 T. B. Mon. 367.

² *Warren v. Norman*, 1 Miss. 387.

³ *Curry v. Collins*, 37 Mo. 324.

⁴ *Brooker v. Coffin*, 5 Johns. 188; 463.

⁵ *Am. Dec.* 337.

⁶ *Chase v. Whitlock*, 3 Hill, 139;

Stevenson v. Hayden, 2 Mass. 406;

Odiorne v. Bacon, 6 Cush. 185.

⁷ *Idol v. Jones*, 2 Dev. 162.

⁸ *Lucas v. Nichols*, 7 Jones, 32.

⁹ *Barret v. Jarvis*, 1 Ohio, 83, note.

¹⁰ *Alfele v. Wright*, 17 Ohio St. 238;

93 Am. Dec. 615.

¹¹ *Gage v. Shelton*, 3 Rich. 242.

¹² *O'Hanlon v. Myers*, 10 Rich. 128.

¹³ *O'Hanlon v. Myers*, 10 Rich. 128.

¹⁴ *McQueen v. Fulgham*, 27 Tex.

¹⁵ *Chaplin v. Cruikshanks*, 2 Har. & J. 247.

¹⁶ *Sterling v. Jugenheimer*, 69 Iowa, 210.

¹⁷ *Hollingsworth v. Shaw*, 19 Ohio St. 430; 2 Am. Rep. 411.

¹⁸ *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261.

¹⁹ *Christal v. Craig*, 80 Mo. 367.

wife to take them, but she refused, and sent for Dr. B, and he said that they were arsenic and poison, and if she had taken any of them they would have killed her; A tried to poison his wife";¹ or saying that the plaintiff's boys "did frequently come to our house, and hire our negroes, and take the dogs, and go down into the river-bottom, and kill cattle no more theirs than mine";² or merely charging a person with setting fire to and burning up his house;³ or calling a person a "gambler," "black-leg," "black-sheep," unless it can be shown that the by-standers understood the words to imply "a cheating gambler, punishable by the criminal law";⁴ or calling one a swindler,⁵ or a trespasser,⁶ a villain,⁷ a wife-beater,⁸ or saying that he whipped his mother.⁹

So it is not actionable to say of a woman, married or single, that she is a prostitute or whore,¹⁰ or that she has committed adultery or fornication with a certain person,¹¹ or that she is unchaste generally.¹²

¹ *Rock v. McClarnon*, 95 Ind. 415.

² *Porter v. Hughey*, 2 Bibb, 232.

³ *Frank v. Dunning*, 38 Wis. 270; *Estes v. Estes*, 75 Me. 478.

⁴ *Barnett v. Allen*, 3 Hurl. & N. 376; 27 L. J. Ex. 412; 1 Fost. & F. 125; *Van Tassel v. Capron*, 1 Denio, 250; 43 Am. Dec. 667.

⁵ *Weil v. Altenhofen*, 26 Wis. 708.

⁶ *Ogden v. Turner*, 6 Mod. 104.

⁷ *Stanhope v. Blith*, 4 Rep. 15.

⁸ *Dudley v. Horn*, 21 Ala. 379; *Birch v. Benton*, 26 Mo. 153.

⁹ *Speaker v. McKenzie*, 26 Mo. 255.

¹⁰ *Brooker v. Coffin*, 5 Johns. 188; 4 Am. Dec. 337; *Buy v. Gillespie*, 2 Johns. 115; 3 Am. Dec. 404; *Berry v. Carter*, 4 Stew. & P. 387; 24 Am. Dec. 762; *Woodbury v. Thompson*, 3 N. H. 194; *Griffin v. Moore*, 43 Md. 246.

¹¹ *Pollard v. Lyon*, 91 U. S. 225.

¹² *Pollard v. Lyon*, 91 U. S. 225; *El-liott v. Ashbury*, 2 Bibb, 473; 5 Am. Dec. 631; *K—— v. H——*, 20 Wis. 239; 91 Am. Dec. 397; *Ross v. Fitch*, 58 Tex. 148. In some states where fornication is indictable and punishable by fine, and if the fine is not paid by imprisonment, the imputation of

unchastity to a female is actionable *per se*: *Miller v. Parish*, 8 Pick. 384; *Mayer v. Schleichter*, 29 Wis. 646; *Haynes v. Ritchey*, 30 Iowa, 76; 6 Am. Rep. 642; *Truman v. Taylor*, 4 Iowa, 424. And in several states such a charge is actionable by statute,—Alabama, California, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, South Carolina: *Smalley v. Anderson*, 2 T. B. Mon. 56; 15 Am. Dec. 121; *Belck v. Belck*, 97 Ind. 73; *McMurray v. Martin*, 107 Ind. 246; *Kedrolevanskey v. Niebaum*, 70 Cal. 216; *McKinney v. Roberts*, 68 Cal. 192. And it is actionable in Ohio: *Barnett v. Ward*, 36 Ohio St. 107; 38 Am. Rep. 561; *Wilson v. Robbins*, *Wright*, 40; and Iowa: *Smith v. Silence*, 4 Iowa, 321; 66 Am. Dec. 137; and it is so held in *Frisbee v. Fowler*, 2 Conn. 707; *Paterson v. Wilkinson*, 55 Me. 42; *Klewin v. Bauman*, 53 Wis. 244; *Reitan v. Goebel*, 33 Minn. 151; *Page v. Merwin*, 54 Conn. 426. To say of a woman, "While she was out there claiming to be A's wife, she was back here claiming to be my wife," does not

Even where words of specific import are employed (such as "thief" or "traitor"), still, if the defendant can satisfy the jury that they were not intended to impute any specific crime, but merely as general terms of abuse, and meant no more than "rogue" or "scoundrel," and were so understood by all who heard the conversation, no action lies.¹ But if the by-standers reasonably understand the words as definitely charging the plaintiff with the commission of some specific crime, an action lies.² When it is apparent that the defendant intended to charge plaintiff with stealing, and that the charge was so understood by those who heard it, an action for slander is maintainable, without regard to whether, technically, plaintiff's act was a theft or a trespass merely.³ Where the by-standers know the transaction referred to in the charge, know that that particular transaction is the one referred to as the ground of the charge, and know that that transaction was not a crime as charged, no action for slander can be maintained; but if the hearers understood the defendant to repeat the charge without reference to the transaction as understood by them, and upon what he might assume to know beyond their knowledge, then the words would be actionable.⁴

Words which merely impute a criminal intention not yet put into action are not actionable.⁵ But as soon as

impute a want of chastity, and is not actionable *per se*: *Funk v. Beverly*, 112 Ind. 190. In Iowa it has been held actionable to charge a woman with having had intercourse with a beast: *Haynes v. Ritchey*, 30 Iowa, 76; 6 Am. Rep. 642; and in Ohio to charge a woman with being a hermaphrodite: *Malone v. Stewart*, 15 Ohio, 319; 45 Am. Dec. 577. The words, "She has been lying on the lounge with a male boarder," spoken of a married woman, do not amount to a charge of fornication or adultery within the Illinois statute, and are not actionable: *Koch v. Heideman*, 16 Ill. App. 478.

¹ *Shecut v. McDowell*, 3 Brev. 38;

5 Am. Dec. 536; *Brite v. Gill*, 2 T. B. Mon. 65; 15 Am. Dec. 122; *Pamer v. Anderson*, 33 Ala. 78; *Quinn v. O'Gara*, 2 E. D. Smith, 388; *Fawsett v. Clark*, 48 Md. 494; 30 Am. Rep. 481.

² *Odgers on Libel and Sander*, 60.

³ *Wilson v. McCrory*, 86 Ind. 170.

⁴ *Carmichael v. Shiel*, 21 Ind. 66; *McCaleb v. Smith*, 22 Iowa, 242; *Pegram v. Styron*, 1 Bail. 595; *Brown v. Myers*, 40 Ohio St. 99; *Stitzell v. Reynolds*, 67 Pa. St. 54; 5 Am. Rep. 396.

⁵ *McKee v. Ingalls*, 5 Ill. 30; *Wilson v. Tatum*, 8 Jones, 300; *Seaton v. Cordray*, *Wright*, 101; *Hotchkiss v. Olmstead*, 37 Ind. 74.

any step is taken to carry out such intention, as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is at common law a misdemeanor, and in itself indictable. To impute such an attempt is therefore actionable.¹

Words which merely disclose a suspicion that is in the speaker's mind, and which the by-standers could not understand as conveying any definite charge of felony, are not actionable.² So where the words are so explained and qualified as not to leave with the hearers a slanderous impression;³ as where a lessor accused his lessee of stealing corn, at the same time explaining to his hearers that the crop was security for the payment of the rent, and showing that the speaker honestly believed a clandestine appropriation thereof by the lessee before a certain date to be larceny, and not merely a breach of trust.⁴ But a charge need not be direct and positive; it is sufficient that from it the imputation of criminality may be inferred. Expressing suspicion or speaking ironically or by

¹ *Harrison v. Stratton*, 4 Esp. 217; *Berdeaux v. Davis*, 58 Ala. 611.

² *Tozer v. Mashford*, 6 Ex. 539; 20 L. J. Ex. 225.

³ In *Trabue v. Mays*, 3 Dana, 138, 28 Am. Dec. 61, the court says: "If a charge be made which amounts to slander, it may be retracted, qualified, or explained in the same conversation and before the persons separate before whom it is made, showing that it does not amount to slander. So to say of a man that he is a murderer, but afterward, before the individuals separate in whose hearing the charge is made, to qualify the charge by stating that he murdered a hare, is not slander; for no impression is left upon the minds of the hearers that he was guilty of the crime of murder. So to say of an individual that he stole a horse, and afterward, in the same conversation, to explain away the imputation, so as to show to the hearers that he meant

only to leave the impression on their minds that he was guilty of a breach of trust, and not of a felony, is not slanderous; or if in a case like the above he revokes the charge altogether in the hearing of the company, and before they or any of them separate; or if he makes the charge as in the above case, and some other individual who is presumed to know more about it is called upon and makes an explanation of the circumstances relating to the offense charged, which shows that the taking of the horse was not felony, and he, in the presence and hearing of the same company, and before they or any of them separate, adopts the explanation, and retracts or qualifies the charge, in such manner as to leave no impression of an imputation of crime to the person charged on the minds of the hearers,—he would not be guilty of slander."

⁴ *Hall v. Adkins*, 59 Mo. 144.

way of comparison or interrogation may make one guilty of slander.¹

Where a crime is charged which it is impossible that the plaintiff could have committed, and all who heard the charge must know it, it is not actionable.² Thus it is not actionable to say, "You stole my land," for a person cannot steal realty, he can only trespass on it;³ or to charge one with stealing trees,⁴ or marl,⁵ or a wild animal not the subject of larceny,⁶ or windows from a house,⁷ or that he "robbed" a town,⁸ or "committed perjury," where the oath was made in an extrajudicial proceeding,⁹ or was upon an immaterial fact, and therefore not indictable.¹⁰ In an old case, the words complained of were "thou hast killed my wife," but the by-standers knew that his wife was still alive, and this was therefore not actionable.¹¹ So where a person was accused of stealing his own property.¹² So, in an English case, it was held not actionable for A to charge a man who is not A's clerk or servant with embezzling A's money; for no indictment for embezzlement would lie.¹³ If, at the time of the utterance of the alleged slanderous words, the person concerning whom they are spoken is not liable to an infamous punishment by reason of the offense charged, the words are not *per se* actionable.¹⁴ So a charge of perjury is not

¹ *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261.

² In Indiana, where the words were, "Thank God, if my daughters did have bastards, they never had pups. She [the plaintiff] did have pups, and I can prove it,"—it was held that, even though connection between a woman and dog and conception might be impossible, the people are not presumed to know scientific facts, and the words were actionable: *Ausman v. Veal*, 10 Ind. 365; 71 Am. Dec. 331.

³ *Stitzell v. Reynolds*, 67 Pa. St. 55; 5 Am. Rep. 396; *Ogden v. Riley*, 14 N. J. L. 186; 25 Am. Dec. 513.

⁴ *Cock v. Wetherby*, 5 Smedes & M. 333.

⁵ *Ogden v. Riley*, 14 N. J. L. 186; 25 Am. Dec. 513.

⁶ *Norton v. Ladd*, 5 N. H. 203; 20 Am. Dec. 573.

⁷ *Wing v. Wing*, 66 Me. 62; 22 Am. Rep. 548.

⁸ *McCarty v. Barrett*, 12 Minn. 494.

⁹ *Hall v. Montgomery*, 8 Ala. 510; *Dalton v. Higgins*, 34 Ga. 433; *Hamm v. Wickline*, 26 Ohio St. 81.

¹⁰ *Darling v. Banks*, 14 Ill. 46; *Ross v. Rouse*, 1 Wend. 475.

¹¹ *Snag v. Gee*, 4 Rep. 16; *Heming v. Power*, 10 Mees. & W. 569.

¹² *Jackson v. Adams*, 2 Bing. N.C. 402.

¹³ *Williams v. Stott*, 1 Cromp. & M. 675; 3 Tyrw. 688.

¹⁴ *Pegram v. Stoltz*, 76 N. C. 349.

actionable where it is alleged to have been committed in a proceeding where false swearing is not legally punishable,¹ or before a magistrate not having jurisdiction.²

But it is actionable to charge a man with committing a crime the *corpus* of which never existed,³ if it is a possible crime;⁴ as, accusing a man of the murder of a person who was alive (if the by-standers did not know it);⁵ or of a perjury in a proceeding which never took place, or in which the plaintiff was not a witness.⁶ In an action for slander, in charging plaintiff with having burned his property to defraud insurers, proof of actual insurance is not necessary, the fact of insurance being immaterial.⁷ An action of slander will lie for words imputing to a wife the commission of a felony jointly with her husband, but not in his presence.⁸

Where the offense is charged to have been committed in a foreign state or country, the words will be actionable if it was one punishable by indictment in that place, and involving moral turpitude.⁹ If the offense was one indictable at common law, it will be presumed to be indictable everywhere, but if it be a statutory offense, the statute of the foreign state must be pleaded and proved.¹⁰ Where the words were spoken in another state, and charge an offense not indictable in that state, they are not actionable in the state where the suit was

¹ Pegram v. Stoltz, 76 N. C. 349; Burkett v. McCarthy, 10 Bush, 758.

² Hamm v. Wickline, 26 Ohio St. 81.

³ Colbert v. Caldwell, 3 Grant Cas. 181; Kennedy v. Gifford, 19 Wend. 296; Carter v. Andrews, 16 Pick. 1.

⁴ Rea v. Harrington, 58 Vt. 181; 56 Am. Rep. 561.

⁵ Sugart v. Carter, 1 Dev. & B. 8; Eckart v. Wilson, 10 Serg. & R. 44; Stallings v. Newman, 26 Ala. 300; 62 Am. Dec. 723.

⁶ Bricker v. Potts, 12 Pa. St. 200; Holt v. Turpin, 78 Ky. 433. In Snyder v. De Gant, 4 Ind. 578, it was held that in an action for slandering the

plaintiff by charging him with perjury at a certain trial, it was a good defense to show that he was not sworn at the trial. But this case was probably overruled in Ausman v. Veal, 10 Ind. 355; 71 Am. Dec. 331.

⁷ Fowler v. Gilbert, 38 Mich. 292.

⁸ Nolan v. Traber, 49 Md. 460; 33 Am. Rep. 277.

⁹ Shipp v. McCraw, 3 Murph. 463; 9 Am. Dec. 610.

¹⁰ Townshend on Slander and Libel, 110; Bundy v. Hart, 46 Mo. 460; 2 Am. Rep. 525; Shipp v. McCraw, 3 Murph. 463; 9 Am. Dec. 611; Wall v. Hoskins, 5 Ired. 177; Klumph v. Dunn, 66 Pa. St. 141; 5 Am. Rep. 355.

brought, though the offense is indictable there.¹ Whether words charging an offense are slanderous *per se* does not depend on the law of the state where they are spoken, but on that of the state where the act is alleged to have taken place.² In an action for slanderous words spoken in Pennsylvania, and charging the commission of adultery in Georgia, it was held that the words charging an offense of moral turpitude punishable by the law of the state where they were uttered were actionable *per se*.³ An action of slander is not taken away though the statute creating the offense charged is repealed.⁴

ILLUSTRATIONS.—The words imputed an offense against the fishery acts, punishable only by fine and forfeiture of the nets and instruments used. *Held*, that no action lay, without proof of special damage: *McCabe v. Foot*, 18 Irish Jur. 9 N. S. 287; 15 L. T. 115. A says of B: "She is a bad woman; she takes medicine and kills her children." In the place where the words are spoken, to cause or procure abortion before the child is quick is not a criminal offense. *Held*, not actionable *per se*: *Abrams v. Foshee*, 3 Iowa, 274; 66 Am. Dec. 77; *Smith v. Gafford*, 31 Ala. 45; but see *Miles v. Vanhorn*, 17 Ind. 245; 79 Am. Dec. 477; *Bissell v. Cornell*, 24 Wend. 354. A statute made it an offense punishable by fine and imprisonment to knowingly furnish watered milk to a factory to be made into butter. The defendant charged the plaintiff with watering his milk which he sold to his factory. *Held*, actionable: *Geary v. Bennett*, 53 Wis. 444.

§ 1247. **Imputing Contagious Disease.**—Words imputing to the plaintiff that he has an infectious or contagious disease are actionable without proof of special damage, the reason given being that the natural effect of such a charge is to cause the party to be shunned, and to exclude him from society.⁵ Such disease, it is said in England, may be either leprosy, venereal disease, or the

¹ *Stout v. Wood*, 1 Blackf. 71; *Barclay v. Thompson*, 2 Pa. 148; *Offutt v. Earlywine*, 4 Blackf. 460; 32 Am. Dec. 40; *Langdon v. Young*, 33 Vt. 136; *Klumph v. Dunn*, 66 Pa. St. 141; 5 Am. Rep. 355.

² *Dufresne v. Weise*, 46 Wis. 290.

³ *Klumph v. Dunn*, 66 Pa. St. 141; 5 Am. Rep. 355.

⁴ *French v. Creath*, 1 Ill. 31.

⁵ *Cooley on Torts*, 200.

plague, but not the itch, the falling-sickness, or the small-pox.¹ But Judge Cooley says: "What diseases would be embraced within this rule is not certain, but it is probable that at the present day only those which are contagious or infectious, and which are also usually brought upon one by disreputable practices; and the list would perhaps be limited to venereal diseases."² It is essential that the charge should impute the existence of the disease at the time it is made.³ Thus a charge that "he has not been able to do any work for the last three or four years; that he was about dead with the bad disease," is not actionable, for "was" means the past.⁴ "Any words which the hearers would naturally understand as conveying that the plaintiff then has such a disease are sufficient. Many distinctions are drawn in old cases about the pox, a word which may imply either the actionable syphilis or the more harmless small-pox. It has been decided that 'he has the pox' (*simpliciter*) shall be taken to mean 'he has the small-pox'; but that if any other words be used referring to the effects of the disease, or the way in which it was caught, or even the medicine taken to cure it, these may be referred to as determining which pox was meant."⁵

§ 1248. **Slander in One's Calling or Office.** — Words are actionable when spoken of persons touching their respective offices, professions, trades, or business, and do or may

¹ Odgers on Libel and Slander, 63; Taylor v. Perr, Rolle Abr. 44; Taylor v. Perkins, Cro. Jac. 144; Villers v. Monsley, 2 Wils. 403.

² Cooley on Torts, 201; Watson v. McCarthy, 2 Ga. 57; 47 Am. Dec. 380; Irons v. Field, 9 R. I. 216; Nichols v. Guy, 2 Ind. 82; Kancher v. Blum, 29 Ohio St. 62; 23 Am. Rep. 737; Williams v. Holdredge, 22 Barb. 396; Hewit v. Mason, 24 How. Pr. 366; Joannes v. Burt, 6 Allen, 236; 83 Am. Dec. 625; Upton v. Upton, N. Y. Sup. Ct., 1889.

³ Taylor v. Hall, 2 Strange, 1189; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 Term Rep. 473; Nichols v. Guy, 2 Ind. 82; Bruce v. Soule, 69 Me. 572; Pike v. Van Wormer, 5 How. Pr. 171.

⁴ Bruce v. Soule, 69 Me. 572.

⁵ Odgers on Libel and Slander, 63. Whether to say of a woman that she has a "bad disease" is equivalent to charging her with having a venereal disease, or imputing to her want of chastity, is for the jury: Upton v. Upton, N. Y. Sup. Ct., 1889.

probably tend to their damage.¹ The reasons for this rule are said to be two: 1. That from the nature of the case damage must necessarily ensue;² and 2. That a person might be effectually ruined in his business by the publication of the slander before his proof of special damage could be completed.³

§ 1249. Office or Calling may be of Any Kind. — The office may be an honorary one; it is not essential that it be one of profit to the holder.⁴ So if he act in the employment and derive emolument therefrom, his calling may be exalted or humble, his only means of livelihood or one of several.⁵ Thus S. was a farm-servant and bailiff of J. S. B. said of him: "Thou art a cozening knave, and hast cozened thy master of a bushel of barley." The court held that, "True it is, generally an action will not lie for calling one 'cozening knave,' yet where the words are spoken of one who is a servant and accomptant, and whose credit and maintenance depends upon his faithful dealing," it will.⁶ T. was a lime-burner, and H. said of him: "He is a cheating knave of a lime-burner." A

¹ This is about the language used by De Grey, C. J., in stating the rule in *Onslow v. Horne*, 3 Wils. 177. It was criticised by Bayley, J., in *Lumby v. Allday*, 1 Crompt. & J. 30, who considered the word "probably" too indefinite and loose, and suggested the phrase "having a natural tendency to" in its stead, adopting the latter words himself two years later in *Sibley v. Tomlins*, 4 Tyrw. 90. But in *James v. Brook*, 9 Q. B. 7, Williams, J., pertinently asked, "How is a 'natural' tendency stronger than 'probable'?" and it would seem that rule, as stated above, is as precise as language can make a general rule.

² *McMullan v. Birch*, 1 Binn. 187; 2 Am. Dec. 426.

³ *Starkie on Slander*, 110.

⁴ *Odgers on Libel and Slander*, 64.

⁵ *Whittaker v. Bradley*, 7 Dowl. & R. 649; *Gates v. Bowker*, 18 Vt. 23; *Seaman v. Bigg*, Cro. Car. 480. Sev-

eral English cases conflict with this statement. Thus in an old one a school-mistress was charged with being a whore, and the court held that such a profession was not an occupation within the protection of this exception to the ordinary rules as to slander: *Wharton v. Brook*, 1 Vent. 21. The same was held of a lessee and renter of turnpike tolls in a later case: *Bellamy v. Burch*, 16 Mees. & W. 26; *Sellers v. Killew*, 7 Dowl. & R. 121; of a stock-jobber of another: *Morris v. Langdale*, 2 Bos. & P. 287; and of a letter-carrier in another: *Bell v. Thatcher*, 1 Vent. 275. But these cases would not be followed in the United States. Our courts have not one rule for the rich and another for the poor; and the humility of the employment is no objection to the action: See *Wilson v. Runyon*, Wright, 65.

⁶ *Seaman v. Bigg*, Cro. Car. 480.

divided court held that T. could recover; for "an action lies for speaking scandalous words of a lime-burner, or of any man of any trade or profession, be it ever so base, if they are spoken with reference to his profession."¹ C. was "engaged in the wooden-ware business," and D. said of him: "You are a cheat." It was contended that the general rule was not applicable to such dealers as C. But the court thought otherwise.² D. was a husbandman. T. said of him: "He owes more money than he is worth; he is run away, and is broke"; and the action was sustained.³ C. was a carpenter, and words similar to those in D.'s case were spoken of him, and the action was sustained.⁴ B. was a blacksmith, and N. said of him: "He keeps false books." The words were held actionable.⁵ B. was an auctioneer, and had been employed by M. to sell his goods. L. retained B. to appraise the same goods for him, and subsequently said of B.: "He is a damned rascal; he has cheated me out of one hundred and nine pounds on the valuation."⁶ This was held actionable.

§ 1250. **Illegal Occupations.** — But the calling must be a legal one: courts will not protect the breakers of the law from injuries to their pockets or reputation. Thus in one case H. was the proprietor of a building in which pugilistic exhibitions were conducted, such exhibitions being illegal. He brought an action against B. for libeling him in his vocation. It was held that he could not recover.⁷ In another, D. was a "cancer-doctor," but was neither a regular physician or surgeon, nor licensed to practice as required by the laws of the state. M. charged him with having killed a woman, and with malpractice. The court held that D. could not maintain an action, unless the words charged him with having committed an

¹ *Terry v. Hooper*, 1 Lev. 115.

² *Carpenter v. Dennis*, 3 Sand. 305.

³ *Dobson v. Thornistone*, 3 Mod. 112.

⁴ *Chapman v. Lamphire*, 3 Mod. 155.

⁵ *Burtch v. Nickerson*, 17 Johns. 217; 8 Am. Dec. 390.

⁶ *Bryant v. Loxton*, 11 Moore, 344.

⁷ *Hunt v. Bell*, 1 Bing. 1.

offense involving moral turpitude or subjecting him to an infamous punishment.¹ In an action by M., a manufacturer of bitters, against C., for charging that his bitters were made to adulterate porter, C. was allowed to prove that M.'s trade was illegal, and that his bitters had been condemned in the court of exchequer.² In another case, C. said of D. that he was a quack, an impostor, and an unqualified person. D. was at the time unlawfully carrying on the practice of medicine. The words were held not actionable.³ But fraud and illegality are never presumed, and hence the court will infer that the plaintiff's occupation is legal until it is proved otherwise.⁴ In a New York case the manager of an Italian opera company which gave performances at the Astor Opera House in New York during the season of 1848 sued the proprietor of the New York Herald for a criticism on the performances, which amounted to a libel. It was held not necessary that the plaintiff should aver and prove that he was duly licensed to give operatic representations as required by statute.⁵ And though a party engaged in an illegal occupation cannot maintain any action for slanderous words directed against him in that occupation, yet if the words concern him as an individual, or in another and legal occupation, an action will lie.⁶

¹ *March v. Davison*, 9 Paige, 581.

² *Manning v. Clement*, 7 Bing. 362.

³ *Collins v. Carnegie*, 1 Ad. & E. 695.

⁴ *Fry v. Bennett*, 28 N. Y. 324.

⁵ *Fry v. Bennett*, 28 N. Y. 324.

⁶ *Greville v. Chapman*, 1 Dav. & M. 553; *Chenery v. Goodrich*, 98 Mass. 224, the court saying: "If the conduct of the plaintiff in connection with the transaction to which the publication relates was open to comment and criticism for the reason that he participated in acts which were contrary to law, and in consequence thereof no action can be maintained for a libelous publication which relates solely to the plaintiff's connection with such unlawful acts, nevertheless

there is a limit beyond which such immunity from liability for defamatory words cannot be carried. Unless the matters set forth in a declaration are of a nature which indicates that the plaintiff's acts and conduct in connection therewith necessarily involved moral turpitude, or might fairly be held to affect his general character in any particular, a publication which held a party up to contempt and reproach as wanting in integrity, or as otherwise culpable in his general conduct or character, would be actionable, although it might also relate to the plaintiff's participation in an illegal transaction. A person does not necessarily forfeit all legal claim to protection against defamatory matter

ILLUSTRATIONS. — Y. was appointed by the members of a revolutionary government in Chili to negotiate a loan for it. C. charged him with saddling the government of Chili with a large debt for his own benefit. *Held*, that an action by Y. against C. was sustainable: *Yrisarri v. Clement*, 2 Car. & P. 223.¹ A. was the owner of race-horses which he ran on the turf. He had entered a horse for the Derby stakes, but before the race, on account of his lameness, he was withdrawn. B. charged A. with entering the horse, and afterwards withdrawing him for the purpose of getting an unfair advantage over parties with whom he had heavy wagers on the result of the race. *Held*, that, even though horse-racing was illegal, A. could recover: *Greville v. Chapman*, 1 Dav. & M. 553. C. was a merchant, and having entered a cargo of rum at the custom-house, delivered it to the storekeeper the next day for warehousing; paid the duties on it the following day, taking it on an order two days later. By mistake, a wrong receipt was given to him, which, on his subsequently applying to withdraw the goods, called for double duties. He thereupon presented the true facts to the storekeeper, who corrected the receipt, when he paid the ordinary duties on the goods, and was given a permit to withdraw them. This was subsequently revoked by the collector, and C. paid double dues under protest. G., referring to the transaction, charged that C. had fraudulently induced the storekeeper to alter the receipt, and that he was devoid of commercial honor. *Held*, that an action would lie: *Chenery v. Goodrich*, 98 Mass. 224.

affecting his character because he has been guilty of a single illegal act. Now, although the plaintiff, acting on certain facts, and in conformity to what he supposed to be the law and usage in similar cases, may have committed a violation of law, or participated in the illegal act of another, it by no means follows that his general character for commercial integrity and fair dealing was thereby forfeited or so far affected that he could not maintain an action for a publication which held him up to the public as wanting in the qualities and characteristics of a merchant of integrity and honor. Such, we think, was the fair import of a portion of the written words which are set forth in the declaration. For the publication of these, this action can be maintained, although it may be also true that it appears from the declaration that the publication related to the plaintiff's

conduct in a transaction which was unlawful."

¹ Best, C. J., saying: "I have no hesitation in acceding to the proposition that the transaction was illegal. No foreigner has a right to act as this plaintiff has acted without the permission of our government, because such a transaction might have involved us in a war with Spain. . . . If that which is charged as being a libel had consisted merely of observations as to the extreme absurdity and illegality of such transactions, though such observations had been couched in the strongest terms, yet if they were expressed honestly, I should have no hesitation in saying that the action could not be maintained; but it goes beyond that, and imputes to the plaintiff the commission of a moral fraud; and for such an imputation I am of opinion that he is entitled to recover."

§ 1251. **Past Holding or Pursuit Insufficient.**—The complainant must have held the office or carried on the occupation concerning which the slanderous words were spoken at the time they were spoken.¹ A person, however, who is shown to have pursued a certain calling at a certain time is presumed to continue to do so until the contrary is proved.² In an English case the plaintiff

¹ *Gibs v. Price*, Style, 231; *Collis v. Malin*, Cro. Car. 282; *Bellamy v. Burch*, 16 Mees. & W. 590; *Forward v. Adams*, 7 Wend. 204; *Edwards v. Howell*, 10 Ired. 211; *Allen v. Hillman*, 12 Pick. 101. There must, therefore, be an allegation that the plaintiff was, at the time of the slander, exercising such calling; *Dicken v. Shepherd*, 22 Md. 399; or something from which this presumption will arise: *Harris v. Burley*, 8 N. H. 216, the court saying: "In this case the words laid in the declaration are not actionable in themselves, unless the plaintiff was a trader at the time of speaking the words. In order to maintain the action, then, it was necessary to prove that the plaintiff was a trader. And the question is, whether it was sufficient to prove that trading had been the business of the plaintiff previously, although he was not actually in trade at the time. In the case of *Walden v. Mitchell*, 2 Vent. 265, the chief justice said that where a man had been in an office of trust, to say that he had behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again, and therefore was actionable. But this is denied to be the law by Lord Chief Justice De Grey, in *Onslow v. Horn*, 3 Wils. 188, who says that he knows of no case, where ever an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation. . . . And from the very nature of the case, what possible damage could the words laid in this action do the plaintiff as a trader, when, at the time they were spoken, he was not in trade? The reason why words imputing fraud in his dealings to a trader are actionable in themselves is because, from the nature of the case, the imputa-

tion must have a tendency to affect his business as a trader. But here the plaintiff had no business as a trader to be affected."

² *Bellamy v. Burch*, 16 Mees. & W. 590; *Smayles v. Smith*, Brownl. 1; *Collis v. Malin*, Cro. Car. 282. "The second error on which they insisted was, that the declaration is not good, because it is not laid precisely that, at the time of speaking the words, the plaintiff was a linen-draper, but only for the space of five years past. To which *Yelverton* answered, that there is a difference between slanders of one in respect of an office and in respect of a trade or profession. For if a man says of a justice of the peace that he is a briber, etc., he must show, in an action for these words, expressly in his declaration that he was a justice of the peace at the time of the words spoke, because they sound in slander of his person in respect of his office only, which office continues during the king's pleasure only, being by commission. But where a man is slandered in his profession or trade, there it need not be precisely alleged that, at the time of the words spoken, he was a lawyer, physician, merchant, or linen-draper; but it is sufficient to show that he is of such a trade, and has exercised it for several years past, without saying *ultimo* or *jam elaps*; for a man shall not be intended to alter his trade or profession, but, by presumption, he continues it during his life. *Quod fuit etiam concessum per curiam*. *Quod nota* and the judgment was affirmed": *Tut-hil v. Milton*, Yel. 159; *Jordan v. Lyster*, Cro. Eliz. 273. In *Dotter v. Ford*, Cro. Eliz. 794, the question was whether, by alleging that he used the trade of a merchant *per multos annos jam retroactos*, it could be presumed that the plaintiff was a merchant at

brought an action for false charges made against him in his occupation of an attorney. A statute required that a certificate should be annually taken out by every attorney, without which they were unable to recover fees, and rendered themselves liable to a penalty if they attempted to practice. The plaintiff had not taken out his annual certificate. The court held that this did not affect his right to sue.¹ If the plaintiff avers that he carries on two trades, it will be sufficient to prove that he carries on one, if the words can affect him in that one.²

ILLUSTRATIONS. — A was twice constable, once in 1843, and again in 1846, and during the latter period a person said of him that, while constable in 1843, he had made a false return. *Held*, that he could not recover: *Edwards v. Howell*, 10 Ired. 211. A. had been treasurer of a Masonic lodge. H. said of him that he had robbed the lodge; but at the time of the slander the lodge had ceased to exist. *Held*, that the words were not actionable: *Allen v. Hillman*, 12 Pick. 100. W. and J. were partners in a mercantile business. In August, 1867, they sold out to O., intending thereafter to go into business again; but did not do so. In January, 1868, O. said of them: "They have sold out; they are not worth fifty cents on the dollar." *Held*, not actionable: *Windsor v. Oliver*, 41 Ga. 538. H. was a co-partner in trade of C. After the partnership had come to an end, and H. had gone out of business, B. said of him: "He has got money out of C." *Held*, not actionable: *Harris v. Burley*, 8 N. H. 216. B. spoke of C. certain words imputing that on a former occasion, while the lessee of certain tolls, he had been a defaulter. At the time of the speaking, he was not a lessee of tolls, but was about to again become so. *Held*, that the action would not lie: *Bellamy v. Burch*, 16 Mees. & W. 590. A had been a linen merchant, but at the time of the slander was a clergyman. B said of him that he was guilty of stealing and fraud as a linen-draper. *Held*, not a slander of A in his office of clergyman: *Hopwood v. Thorn*, 8 Com. B. 293.

§ 1252. Words Actionable where the Calling or Office is Slandered. — It is actionable to impute ignorance

the time the words were spoken. "And the court seemed to doubt thereof, because it is not precisely alleged; for it may be he used that trade for a long time, and left it after-

wards. Wherefore they would advise thereof."

¹ *Jones v. Stevens*, 11 Price, 235.

² *Figgins v. Cogswell*, 3 Maule & S. 369; *Hall v. Smith*, 1 Maule & S. 287.

where learning and skill are requisite, or dishonesty where integrity is indispensable, or immorality where morality is absolutely required, or the absence of any other qualifications which are necessary to the prosecution of a particular profession or calling or the holding of a particular office.

§ 1253. **In General.** — Thus it is actionable to impute drunkenness to a school-master;¹ or to say of an architect engaged to restore a church that he has no experience in church work;² or that “the poor fellow is crazy,” and “his appointment as architect of a public building can be regarded in no other light than as a public calamity”;³ or to say of a land surveyor: “Thou art a cozener and a cheating knave, and that I can prove”;⁴ or to say of a clerk or servant that he had “cozened his master”;⁵ or to say of a servant girl that she had had a miscarriage, and had lost her place in consequence;⁶ or to say to an innkeeper: “Thy house is infected with the pox, and thy wife was laid of the pox”; for even if small-pox only was meant, still “it was a discredit to the plaintiff, and guests would not resort” to his house;⁷ or, “He kept no accommodations, and a person could not get a decent bed or meal there if he tried”;⁸ or to say of a ship-master that “he sold the consignment of the ship R. S. [of which he was master], and pocketed the money.”⁹

ILLUSTRATIONS. — A was a school-master, and B said of him: “Put not your son to him; for he will come away as very a dunce as he went.” *Held*, actionable: *Watson v. Vanderlash*, Het. 71. F. was R.’s game-keeper. N. said of him: “It is no wonder that we did not find any foxes in R.’s wood, because F. trapped them. *Held*, actionable: *Foulger v. Newcomb*, L. R. 2 Ex. 327.

¹ *Brandrick v. Johnson*, 1 Vict. L. R. C. L. 306.

² *Botterill v. Whytehead*, 41 L. T., N. S., 588.

³ *Clifford v. Cochrane*, 10 Ill. App. 570.

⁴ *London v. Eastgate*, 2 Rolle, 72.

⁵ *Seaman v. Bigg*, Cro. Car. 480; *Reignald’s Case*, Cro. Car. 563.

⁶ *Connors v. Justice*, 13 Ir. C. L. Rep. 451.

⁷ *Levet’s Case*, Cro. Eliz. 289.

⁸ *Trimmer v. Hiscock*, 27 Hun, 364.

⁹ *Dorr v. Skofield*, 56 Me. 483.

W. was a school-mistress, and R. said of her: "She is a nasty, dirty slut." *Held*, actionable: *Wilson v. Runyon*, Wright, 651.¹ A was captain of a vessel. B. said of him that he was drunk while in command of it at sea. *Held*, actionable: *Irwin v. Brandwood*, 2 Hurl. & C. 961. S. was the chief engineer of a fire department, and H. charged him with being drunk at a fire. *Held*, actionable: *Gottbehuet v. Hubackek*, 36 Wis. 515.

§ 1254. **Attorneys.** — It is actionable to charge an attorney with dishonesty in his profession;² or with being ignorant, and not having the qualifications of a lawyer;³ to say of an attorney that he deserved to be struck off the roll;⁴ or that he cannot read a declaration;⁵ or "He has no more law than Master Cheyny's bull"; or "He has no more law than a goose";⁶ or "He is only an attorney's clerk, and a rogue; he is no attorney"; or any words imputing that he is not a fully qualified practitioner;⁷ or "He is an ambidexter," i. e., one who being retained by one party in a cause, and having learned all his secrets, goes over to the other side and acts for the adversary;⁸ or that he will betray his clients' secrets and overthrow their cause;⁹ or that he is guilty of barratry, champerty, or maintenance;¹⁰ or "He stirreth up suits, and once promised me that if he did not recover in a cause for me he would take no charges of me," because stirring up suits is barratry, and undertaking a suit, no purchase no pay, is maintenance";¹¹ or that he is a drunkard, and makes ex-

¹ This ruling is sustainable at common law, only on the ground that it is particularly required of a woman engaged in instructing youth that she shall not be what there she was charged with.

² *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105.

³ "To say of an attorney he is no lawyer is a great reflection upon him, and means that he does not understand his business; besides, an attorney must have a competent knowledge of the law, or he cannot draw a common writ or declaration": *Day v. Buller*, 3 Wils. 59.

⁴ *Phillips v. Jansen*, 2 Esp. 624;

Warton v. Gearing, 1 Vict. L. R. C. L. 122.

⁵ *Powell v. Jones*, 1 Lev. 297.

⁶ *Baker v. Morfue*, vel *Morphew*, Sid. 327; 2 Keb. 202.

⁷ *Hardwick v. Chandler*, Strange, 1138.

⁸ *Annisson v. Blofield*, Carter, 214; 1 Rolle Abr. 55.

⁹ *Martyn v. Burlings*, Cro. Eliz. 589.

¹⁰ *Boxe v. Barnaby*, 1 Rolle Abr. 55; Hob. 117; *Proud v. Hawes*, Cro. Eliz. 171; Hob. 140; *Taylor v. Starkey*, Cro. Car. 192.

¹¹ *Smith v. Andrews*, 1 Rolle Abr. 54; Hob. 117.

tortionate charges for his services;¹ or "Thou art no lawyer; thou canst not make a lease; thou hast that degree without desert; they are fools who come to thee for law";² or "He hath as much law as a jackanapes";³ or "He is a very base rogue and a cheating knave, and doth maintain himself, his wife and children, by his cheating";⁴ or that "he hath the falling-sickness," for that disables him in his profession;⁵ or "He has deceived his client, and revealed the secrets of his cause";⁶ or "What! does he pretend to be a lawyer? He is no more a lawyer than the Devil";⁷ or "He will give vexatious and ill counsel, and stir up a suit and milk her purse, and fill his own large pockets."⁸

ILLUSTRATIONS. — C. charged an attorney who collected claims against the government that he "did a good thing in his sober moments in the way of collecting soldiers' claims against the government for a fearful percentage." *Held*, actionable: *Sanderson v. Caldwell*, 45 N. Y. 398.⁹ P. was a lawyer. J. said of him: "He is a dunce, and will get little by the law." *Held*, actionable: *Peard v. Jones*, Cro. Car. 382.¹⁰ R. was an attorney. C. said of him: "He is a cheat." *Held*, actionable: *Rush v. Cavanaugh*, 2 Pa. St. 187. C. was an attorney. D. said of him: "C. is a man not to be trusted in his business of an attorney. He will take fees on both sides." *Held*, actionable: *Chipman v. Cook*, 2 Tyler, 456. G. was an attorney, and S. said of him: "He discloses his clients' secrets." *Held*, actionable: *Garr v. Selden*, 6 Barb. 416.

¹ *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105.

² *Bankes v. Allen*, Rolle Abr. 54.

³ *Palmer v. Boyer*, Owen, 17; Cro. Eliz. 342; cited with approval in *Broke's Case*, Moore, 409. In *Cawdrey v. Tetley*, Godb. 441, it is said that had the words been, "He has no more wit than a jackanapes," no action would have lain; wit not being essential to success at the bar, according to *F. Pollock*, 2 Ad. & E. 4.

⁴ *Anon.*, Cro. Car. 516. See *Jenkins v. Smith*, Cro. Jac. 586.

⁵ *Taylor v. Perr*, 1 Rolle Abr. 44.

⁶ *Snag v. Gray*, 1 Rolle Abr. 57; Co. Entr. 22.

⁷ *Day v. Buller*, 3 Wils. 59.

⁸ *King v. Lake*, 2 Vent. 28; Hardr. 470.

⁹ The case was for a printed libel, but the court said that the result would not have been different had the slander been verbal.

¹⁰ In this case it was argued that "dunce" was commonly spoken of one who was dull and heavy of wit; that one so described might not be as quick and ready as others, yet might have a more deliberate and solid judgment; but all the court thought that a "dunce" was a person of dull capacity and apprehension, not fit to be a lawyer.

§ 1255. **Clergymen.** — Though a charge of immorality not amounting to an indictable crime is not actionable *per se*, there is an exception in the case of a clergyman or priest. Ministers of the gospel being teachers and exemplars of moral and Christian duty, a pure and unspotted moral character is absolutely necessary to their usefulness. A merchant or a doctor or a lawyer might, by a reputation for drunkenness, lose a portion of his trade or his practice. This, however, would generally depend upon the extent to which his excesses interfered with the discharge of his duties; and a merchant who was always to be found in his store during business hours, or a lawyer whose indulgences were never known to prevent his properly managing his cases, would probably suffer little in his calling by being charged with employing his leisure in dissipation. But with a minister of the gospel it is different. His whole life, and not the hours he is engaged in the pulpit, is watched and closely scrutinized. As said in *Chaddock v. Briggs*,¹ “he is separated from the world by his public ordination, and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit in his whole deportment the purity of that religion which he professes to teach. He is as much in office when retired to the bosom of his family as when employed in public duties, and his example, in the practice of all the moral virtues, and particularly of temperance, is not the least of the duties incurred by his profession.”² Thus it has been held actionable *per se* to charge a clergyman with drunkenness;³ or with incest, even where that crime is not indictable;⁴ or to say that “he is a drunkard,

¹ 13 Mass. 248; 7 Am. Dec. 137.

² *Highmore v. Harrington*, 3 Com. B., N. S., 142; *Gallmey v. Marshall*, 9 Ex. 294.

³ *Chaddock v. Briggs*, 13 Mass. 248; 7 Am. Dec. 137; *McMillan v. Bush*, 1 Binn. 178; 2 Am. Dec. 426; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303.

⁴ *Starr v. Gardner*, 6 U. C. Q. B. 512, the court saying: “In this country, or in any Christian country, no congregation would abide under his ministry for a day after he had been, in fact, detected in a crime of that peculiar nature; he could not show his face in society, but would be as certainly and effectually excluded, more

a whoremaster, a common swearer, a common liar, and hath preached false doctrine, and deserves to be degraded";¹ or that he has indecently assaulted a woman;² or that he drugged the speaker, and so induced him to sign a note;³ or that "he preaches nothing but lies and malice in the pulpit," for the words are clearly spoken of him in the way of his profession;⁴ or that he "used and embezzled money for his own wrongful uses, and I will prove it; and he is unfit to be the minister in our pulpit."⁵

§ 1256. **Mechanics and Workmen.** — So an imputation of insolvency is actionable in the case of a mechanic. In an English case,⁶ it was argued that such words were not actionable, because they did not tend to his disparagement; for he might be broken, and yet be as good a carpenter as before; that a carpenter builds upon the credit of other men; and so long as the words did not touch him in his skill and knowledge of his profession, they could not injure him. But the court said: "The credit which the defendant hath in the world may be a means to support his skill; for he may not have an opportunity to show his workmanship without those materials for which he is intrusted." So it is actionable to say of a mechanic that he is no workman, or otherwise to charge a lack of the skill requisite for the carrying on of his trade;⁷ to say of a watch-maker, "He is a bungler, and knows not how to make a good watch."⁸

ILLUSTRATIONS. — R. said of F., who was a mason: "He is no mechanic; he cannot make a good wall, or do a good job of

especially from an office which required him to inculcate religion and morality, as if he had committed an unnatural crime; and much more certainly than if he had committed many other offenses which the law makes felony."

¹ *Dod v. Robinson*, Aleyn, 63; *Dr. Sibthorpe's Case*, W. Jones, 366; *Rolle Abr.* 58.

² *Evans v. Gwyn*, 5 Q. B. 844.

³ *Pemberton v. Colls*, 10 Q. B. 461.

⁴ *Cranden v. Walden*, 3 Lev. 17; *Pocock v. Nash*, Comb. 253; *Musgrave v. Bovey*, Strob. 946.

⁵ *Franklin v. Browne*, 67 Ga. 272.

⁶ *Chapman v. Lamphire*, 3 Mod. 155.

⁷ *Fitzgerald v. Redfield*, 11 Barb. 484.

⁸ *Redman v. Pyne*, 1 Mod. 19.

plastering; he is no workman; he is a botch." *Held*, actionable: *Fitzgerald v. Redfield*, 11 Barb. 484. C. was a carpenter, and L. said of him: "He is broken, and run away, and will never return again." *Held*, actionable: *Chapman v. Lamphire*, 3 Mod. 155.

§ 1257. **Merchants and Traders.** — Thus in all occupations where credit is essential — as that of a merchant or trader — an imputation of insolvency is actionable *per se*.¹ Thus it is actionable *per se* to say of any trader that "he is not able to pay his debts";² or to say to a tailor, "I heard you were run away," *scilicet*, from your creditors;³ or to say of a brewer that he had been arrested for debt, and this, although no express reference to his trade was made at time of publication, for such words must necessarily affect his credit therein;⁴ or to assert that the plaintiff had once been bankrupt in another place, when carrying on another trade, for that may still affect him here in his present trade.⁵ So a charge of dishonesty in a merchant or trader in his business is actionable *per se*; as, for example, that a butcher or other dealer uses false weights;⁶ that a dealer in grain or any other article delivers short quantities or inferior goods,⁷ or adulterates his goods;⁸ that a merchant keeps false books;⁹ or to say of a merchant, "You have received more tobacco in your house than

¹ Townshend on Slander and Libel, sec. 191; *Brown v. Smith*, 13 Com. B. 596; *Gostling v. Brooks*, 2 Fost. & F. 76; *Robinson v. Marchant*, 7 Q. B. 918; *Harrison v. Bevington*, 8 Car. & P. 708; *Whittington v. Gladwin*, 5 Barn. & C. 180; *Lewis v. Hawley*, 2 Day, 495; 2 Am. Dec. 121; even though he is not subject to the bankruptcy laws: *Whittington v. Gladwin*, 5 Barn. & C. 180.

² *Orpwood v. Barks*, 4 Bing. 261; *Morris v. Langdale*, 2 Bos. & P. 284; in *Phillips v. Hoefer*, 44 Am. Dec. 111, 1 Pa. St. 62, the plaintiff was a farmer, and the words were held actionable *per se*.

³ *Davis v. Lewis*, 7 Term Rep. 17. And see *Dobson v. Thornstone*, 3 Mod. 112; *Chapman v. Lamphire*, 3 Mod.

155; *Arne v. Johnson*, 10 Mod. 111; *Harrison v. Thornborough*, 10 Mod. 196; *Gilb.* 114.

⁴ *Jones v. Littler*, 7 Mees. & W. 423; 10 L. J. Ex. 171.

⁵ *Leycroft v. Dunker*, Cro. Car. 317; *Hall v. Smith*, 1 Maule & S. 287; *Figins v. Cogswell*, 3 Maule & S. 369.

⁶ *Griffiths v. Lewis*, 15 L. J. Q. B. 249; *Prior v. Wilson*, 1 Com. B., N. S., 95.

⁷ *Thomas v. Jackson*, 3 Bing. 104.

⁸ *Jesson v. Hayes*, Rolle Abr. 63. Words charging a mere adulteration are not actionable; addition of foreign substances in refining sugar may be proper: *Havemeyer v. Fuller*, 10 Abb. N. C. 9.

⁹ *Backus v. Richardson*, 5 Johns. 477.

you have accounted for;¹ or to say of a contractor, "He used the old materials," when his contract was for new;² or to say of a butcher that he slaughters and sells diseased and unwholesome meats,³ or that he changed the lamb bought of him for a coarse piece of mutton,⁴ or that he dressed and sold an unborn calf from a dead cow;⁵ or to call a business man a defrauder, and to tell him that all he has he accumulated by defrauding.⁶ It is proper to refuse to charge that the words that plaintiff is suffering from overwork, and his mental condition is not good, and that there has been trouble in the affairs of the bank (of which plaintiff is teller), occasioned by plaintiff's mental derangement, and that his statements when he was probably not responsible for them have caused bad rumors, are libelous *per se*; the court having charged that, if their tendency was to injure plaintiff in his profession, they are libelous.⁷

But it is not actionable *per se* to say of a merchant that he has executed a chattel mortgage.⁸ Slandering a partner by declaring him to be insolvent is no slander of the firm of which he is a member.⁹

ILLUSTRATIONS. — R. was a lace-man. H. said of him: "You are a rascal; you are a pitiful, sorry rascal; you are next door

¹ Hoyle v. Young, 1 Wash. (Va.) 150; 1 Am. Dec. 446.

² Babonneau v. Farrell, 15 Com. B. 360; 24 L. J. C. P. 9; 1 Jur., N.S., 114; 3 C. L. R. 243; Sir R. Greenfield's Case, March, 82; 1 Vin. Abr. 465; Smith v. Mathews, 1 Moody & R. 151.

³ Young v. Kuhn, 71 Tex. 645.

⁴ Crisp v. Gill, 29 L. T., O. S., 82; Rice v. Pidgeon, Comb. 161.

⁵ Singer v. Bender, 64 Wis. 169.

⁶ Noeninger v. Vogt, 88 Mo. 589.

⁷ Moore v. Francis, 20 N. Y. State Rep. 641.

⁸ Newbold v. Bradstreet, 57 Md. 38; 40 Am. Rep. 426, the court saying: "We have been referred to no case, and have been able to find none, in which it has been held that to say of a merchant simply that he has made a

chattel mortgage, without anything more as to amount, subject of the mortgage, or the occasion of it, is libelous or slanderous *per se*, and that damage therefrom is necessarily inferred. We think no such legal inference can in reason be indulged. Chattel mortgages as well as the pledge of stocks and other securities may be made by merchants and others without giving rise to any legal inference or presumption of insolvency, or that such an act will necessarily tend to impair or injure the credit and standing of the mortgager or pledgor. Indeed, we suppose it would be alarming to merchants and tradesmen to learn otherwise."

⁹ Davis v. Ruff, Cheves, 17; 34 Am. Dec. 584.

to breaking." *Held*, actionable: *Read v. Hudson*, *Ld. Raym.* 610. R. was a husbandman, and T. said of him: "He owes more money than he is worth; he is run away, and broke." *Held*, actionable: *Dobson v. Thornistone*, 3 *Mod.* 112. R. was a banker, and M. said of him: "R. has had his checks returned back unpaid." *Held*, actionable: *Robinson v. Marchant*, 7 *Q. B.* 918. B. was a storekeeper, and W. said: "He has nothing but rotten goods in his shop." *Held*, actionable: *Burnet v. Wells*, 12 *Mod.* 420.¹ Defendant sold paints to plaintiff under a condition that plaintiff should not add anything to them, and that plaintiff had violated his agreement. *Held*, that an action of slander founded on defendant's statement that plaintiff had adulterated the paints could not be maintained: *Lynch v. Febiger*, 39 *La. Ann.* 336. R. was an auctioneer. G. said of him: "You are a deceitful rascal, a villain, and a liar. I would not trust you with an auctioneer's license. You robbed a man you called your friend; and not satisfied with ten pounds, you robbed him of twenty pounds a fortnight ago." *Held*, actionable: *Ramsdale v. Greenacre*, 1 *Fost. & F.* 61.

§ 1258. **Officers.**—It is actionable to assail the character and integrity of a judge;² as to say that a judge gives corrupt sentences.³ So it is actionable to assail the character and integrity of a justice of the peace;⁴ to say that a justice of the peace takes bribes or "perverts

¹ But had the words been simply, "He has rotten goods in his shop," they would not have been actionable. There are probably few storekeepers who have not among their stock some damaged or rotten goods, which they either do not offer at all, or offer only at a sacrifice; but a tradesman whose whole stock was alleged to be rotten would certainly be avoided by the public.

² *Robbins v. Treadway*, 2 *J. J. Marsh.* 540; 19 *Am. Dec.* 152; *Hook v. Hackney*, 16 *Serg. & R.* 385.

³ *Cæsar v. Curseny*, *Cro. Eliz.* 305.

⁴ *Orain v. Franklin*, 5 *Blackf.* 42. In England, it is held that since no special learning or ability is expected of a justice of the peace, it is not actionable to call him "fool," "ass," "blockhead," or any other words merely imputing want of natural cleverness or ignorance of law. But words which impute to him corruption, dis-

honesty, extortion, or sedition are actionable of course: *Bill v. Neal*, 1 *Lev.* 52; *How v. Prin*, *Holt*, 652; 2 *Salk.* 694; *Aston v. Blagrove*, 1 *Strange*, 617; 8 *Mod.* 270. But in Wisconsin, it has been held actionable to call a justice of the peace "a damned fool of a justice": *Spiering v. Andrae*, 45 *Wis.* 330; 30 *Am. Rep.* 744. Calling a magistrate a "damned blackleg," and charging him with being in a "combined company to cheat strangers," is not actionable where no official misconduct or neglect of official duty is alleged against him: *Van Tassel v. Capron*, 1 *Denio*, 250; 43 *Am. Dec.* 667. Speaking of a magistrate as "squire," in using opprobrious words concerning him, is mere *descriptio personæ*, and does not import that the words were spoken of him in respect of his office: *Van Tassel v. Capron*, 1 *Denio*, 250; 43 *Am. Dec.* 667.

justice to serve his own turn";¹ to assail the character and integrity of a circuit court commissioner.² It is actionable to charge any public officer with taking bribes;³ or to say of a town clerk that he hath not performed his office according to law;⁴ or to say of a constable, "He is not worthy the office of constable";⁵ or to say of a postmaster that he broke open or destroyed mail matter;⁶ or to say to a church-warden, "Thou art a cheating knave, and hast cheated the parish of forty pounds";⁷ or to say of an election inspector that "he counted four votes which were cast for E. for B. for sheriff. . . . It is true; there is no doubt about it. There was a man standing looking right over plaintiff's shoulder and saw him do it; it is a swindle."⁸

ILLUSTRATIONS.—The defendant said of a justice of the peace, "Gove perjured himself in deciding the suit of Whitcomb against me, . . . and I will be damned if I will believe him under oath, for he has decided against me contrary to all law and evidence, and it is the God damnedest erroneous decision I ever saw any justice give, and it was damned outrage, and it was done for spite." *Held*, actionable: *Gove v. Blethen*, 21 Minn. 80; 18 Am. Rep. 380.

§ 1259. **Physicians or Surgeons.**—To charge a physician or surgeon with ignorance, incapacity, or want of professional qualifications is actionable.⁹ So it is to charge that he is so bad a character that no other medical man will meet him; because a medical man must frequently require the assistance and advice of his professional brethren, and to impute to him that, on account

¹ *Cesar v. Curseny*, Cro. Eliz. 305; *Carn v. Osgood*, 1 Lev. 280; *Alleston v. Moor*, Het. 167; *Masham v. Bridges*, Cro. Car. 223; *Isham v. York*, Cro. Car. 15; *Beaumont v. Hastings*, Cro. Jac. 240; *Aston v. Blagrove*, 1 Strange, 617; 8 Mod. 270.

² *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 281.

³ *Purdy v. Stacey*, Burr. 2698; *Moor v. Foster*, Cro. Jac. 65.

⁴ *Fowell v. Cowe*, Rolle Abr. 56; *Wright v. Moorhouse*, Cro. Eliz. 358.

⁵ *Taylor v. How*, Cro. Eliz. 861; 1 Vin. Abr. 464.

⁶ *Harris v. Terry*, 98 N. C. 131.

⁷ *Strode v. Holmes*, Styles, 338; 1 Rolle Abr. 58; *Woodruff v. Weoley*, 1 Vin. Abr. 463.

⁸ *Ellsworth v. Hayes*, 71 Wis. 427.

⁹ *Cruikshank v. Gordon*, 48 Hun, 308, and cases in following notes.

of his character, he is not able to obtain this for his patients, however necessary it may be, is to charge him with lacking a very important qualification for the discharge of his duties;¹ or that he has caused the death of any patient through his ignorance or culpable negligence;² or that he is a "quacksalver," an "empiric," or a "mountebank";³ or that "he is no doctor; he bought his diploma for fifty dollars."⁴

ILLUSTRATIONS. — T. was an apothecary, and A. said of him: "It is a world of blood he has to answer for in this town; through his ignorance he did kill a woman and two children at S.; he has killed his patients with physic." *Held*, actionable: *Tutty v. Alewin*, 11 Mod. 221. C. was a physician, and H. said of him: "Thou art a drunken fool, and an ass; thou wert never a scholar, and art not worthy to speak to a scholar, and that I will prove and justify." *Held*, actionable: *Cawdry v. Highley*, Cro. Car. 212; *sub nom. Cawdry and Telley's Case*, Godb. 441. B. was a midwife. W. said of her: "She is an ignorant woman, and of small practice, and very unfortunate in her way. There are few that she goes to but lie desperately ill, or die under her hands." *Held*, actionable: *Wharton v. Brook*, 1 Vent. 21. S. was a surgeon, and D. said of him: "I wonder you had him to attend you. Do you know him? There have been many inquests had upon persons who have died because he attended them." *Held*, actionable: *Southee v. Denny*, 1 Ex. 196. J. was a physician, and R. said of him: "He killed the child by giving it too much calomel." *Held*, actionable: *Johnson v. Robertson*, 8 Port. 486.

§ 1260. **Aliter where only General Reputation is Attacked.** — But the language, in order to be actionable, must affect the plaintiff in his particular office or occupation; that his general reputation is affected is insufficient.⁵ To

¹ *Southee v. Denny*, 1 Ex. 196.

² *Tutty v. Alewin*, 11 Mod. 221; *Southee v. Denny*, 1 Ex. 196; *Edsall v. Russell*, 4 Man. & G. 1090.

³ *Allen v. Eaton*, 1 Rolle Abr. 54; *Goddard v. Haselfoot*, 1 Vin. Abr. 12.

⁴ *Bergold v. Puchta*, 2 Thomp. & C. 532.

⁵ To call a tradesman "a rogue," or "a cheat," or "a cozenor" is not actionable, unless it can be shown that

the words refer to his trade. To impute distinctly that he cheats or cozen in his trade is actionable: *Johns v. Gittings*, Cro. Eliz. 239; *Cotes v. Kettle*, Cro. Jac. 204; *Terry v. Hooper*, 1 Lev. 115; *Savage v. Robury*, 5 Mod. 398; 2 Salk. 694; *Surman v. Shelleto*, 3 Burr. 1688; *Bromesfield v. Snoke*, 12 Mod. 307; *Savile v. Jardine*, 2 H. Black. 531; *Lancaster v. French*, 2 Strange, 797; *Davis v. Miller*, 2 Strange, 1169; *Fellowes v. Hunter*, 20 U. C. Q. B. 382.

say of an attorney that he has been involved in transactions on the turf and been horsewhipped off the course is not actionable,¹ for the creditors the attorney was charged with having defrauded were those he had made in his transactions on the turf, not in his profession of an attorney. If his clients were satisfied with his skill and attention to his affairs, it would not follow that they would withdraw their business simply because he did not pay his gambling debts. If the defendant, instead of saying, "He has defrauded his creditors," had said, "He has defrauded his clients," he might have been held. In a case in the time of Charles I. it was ruled that a man was not liable for saying of a lawyer, "Thou has no more wit than a jackanapes." But he would substitute "law" for "wit" at his peril.² To charge a physician with adultery is not actionable. Abstaining from acts of incontinence is no part of the profession of a physician, and the committing or not committing adultery has nothing to do with the exercise of his profession; the latter is no more his duty than the duty of every other man. If his professional skill was great, his practice would hardly suffer from such a charge.³ Words spoken of a physician of mere contempt, implying, not professional ignorance, but a want of professional dignity, manifested by a petty attention to small and simple cases, have been held not actionable, as, "He is a twopenny bleeder."⁴ It is not actionable to say of a keeper of a restaurant, "You are an infernal

¹ *Doyley v. Roberts*, 3 Bing. N. C. 835. "These words," said Tindal, C. J., "though spoken of an attorney, do not touch him in his profession any more than they would touch a person in any other trade or profession. It is found, indeed, that the words have a tendency to injury him morally and professionally, and that is true; but it applies equally to all other professions, for a person cannot say anything disparagingly of another that has not that tendency." "When the

jury," said Vaughan, J., "found that these words were not spoken of the plaintiff in his character of attorney, they took the sting out of the imputation." And see *Van Epps v. Jones*, 50 Ga. 238.

² *Palmer's Case*, Godb. 441.

³ *Ayre v. Craven*, 2 Ad. & E. 2. But a charge that a physician took advantage of his position to seduce or commit adultery with a patient would be actionable *per se*.

⁴ *Foster v. Small*, 3 Whart. 138.

rogue and swindler," for there might be very successful restaurant-keepers who were both rogues and swindlers;¹ nor to call a carpenter a rogue, or a cooper a varlet and a knave;² or to say of a working stone-mason, "He was the ringleader of the nine-hour system," and "he has ruined the town by bringing about the nine-hour system," and "he has stopped several good jobs from being carried out by being the ringleader of the system at Llanelly";³ or to say of a justice, "He is a damned rogue."⁴ In an old case the plaintiff was a dancing-mistress for girls. The defendant said of her: "She is as much a man as I am; she got J. S. with child. She is a hermaphrodite." This was held not actionable. The court said that the charge was not peculiarly injurious to her profession. If to teach dancing to girls females were always required, and none others would be employed, the language would have been actionable; but the court took notice of the fact that men were, even more frequently than women, engaged in teaching dancing to both sexes.⁵

ILLUSTRATIONS. — A. was a physician, and C. said of him: "Have you heard that it is out who are the parties in the *crim. con.* affair that has been so long talked about, — Dr. A.?" *Held*, not actionable: *Ayre v. Craven*, 2 Ad. & E. 2. Daws intended to employ the plaintiff, a surgeon and accoucheur, at his wife's approaching confinement; but the defendant told Daws that the plaintiff's female servant had had a child by the plaintiff; Daws consequently decided not to employ the plaintiff; Daws told his mother and his wife's sister what defendant had said, and consequently the plaintiff's practice fell off considerably among Daws's friends and acquaintances and others. The fee for one confinement was a guinea. *Held*, that the action lay, special damage being proved; that the

¹ *Brady v. Youlden*, Kerford and Box's Digest of Victorian Reports, 709.

² *Lancaster v. French*, 2 Strange, 799; *Cotes v. Keble*, Cro. Jac. 204.

³ *Miller v. David*, L. R. 9 Com. P. 118.

⁴ *Oakley v. Farrington*, 1 Johns. Cas. 130; 1 Am. Dec. 107.

⁵ *Wetherhead v. Armitage*, 2 Lev.

233. In *Malone v. Stewart*, 15 Ohio, 319, 45 Am. Dec. 577, the supreme court of Ohio held that to call any woman a hermaphrodite was actionable *per se*, replying, in answer to the objection that such a conclusion was in the teeth of all the precedents, "It is sufficient that this court will not permit so gross a wrong to pass without a remedy."

plaintiff was entitled to more than the one guinea damages; that the jury should give him such sum as they considered Daws's custom was worth to him; but that the jury clearly could not in this action give him anything for the general decline of his business: *Dixon v. Smith*, 5 Hurl. & N. 450; 29 L. J. Ex. 125. P. was an attorney, and J. said of him: "I have taken out a summons to tax his bill; I shall bring him to book, and have him struck off the roll." *Held*, not actionable: *Phillips v. Jansen*, 2 Esp. 624.¹ S. was a pork-butcher. T. said of him: "You are a bloody thief. Who stole F.'s pigs? You did you bloody thief, and I can prove it; you poisoned them with mustard and brimstone." *Held*, not actionable: *Sibley v. Tomlins*, 4 Tyrw. 90.² B. was a stay-maker, having in his employ a female assistant. C. said of him: "The business of a stay-maker does not keep him, but the prostitution of the person in the shop; after it is shut it is as bad as any bawdy-house in the town." *Held*, not actionable: *Brayne v. Cooper*, 5 Mees. & W. 249.³ L. was clerk of a gas company, and A. said of him: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores." *Held*, not actionable: *Lumby v. Allday*, 1 Crompt. & J. 301.⁴ F. was a dealer and speculator in land, and H. said of him: "He cheated me out of a hundred acres of land." *Held*, not actionable: *Fellowes v. Hunter*, 20 U. C. Q. B. 382. I. was the proprietor of a public house and garden, and M. said of him: "He is a dangerous man; he is a desperate man. I am afraid to go to his house alone. I am afraid of my life." *Held*, not actionable: *Ireland v. McGarrish*, 1 Sand. 115. A was a livery-stable keeper, and B said of him: "You are a regular prover under bankruptcy; you are a regular bankrupt-maker." *Held*, not actionable: *Alexander v. Angle*, 1 Crompt. & J. 143; *Angle v. Alexander*, 7 Bing. 123.⁵ P.

¹ It was said in this case that if the words had been, "He deserves to be struck off the roll," they would have been actionable. As it was, they were spoken only with reference to an overcharge in a single bill, — something not likely to seriously injure the reputation of a professional man.

² In this case, the words did not show that S. was any more an improper person to carry on the business of a pork-butcher than any other business. No improper act in his trade was charged, as would have been had the words been, "You poisoned F.'s pigs and sold them," or "You sell tainted meat."

³ A man's moral conduct "after the

shop is shut" does not affect his business if he is honest in his dealings.

"The words spoken of the plaintiff did not impute to him the want of any qualification which a clerk should have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of a clerk.

⁵ "This does not seem to me," said Tindal, C. J., "to fall within that class of cases which relates to imputations upon a person with reference to his trade. To say of a carpenter that he is a bungler is actionable, for it imputes to him a want of skill; to say of a vendor that his goods are rotten, or that he keeps false books, which is an imputation of dishonesty in his trade, is also actionable; so,

was an innkeeper; C. said of him: "You have stolen goods in your house, and you know it." *Held*, not actionable: *Paterson v. Collins*, 11 U. C. Q. B. 63. C. was a cooper, and K. said of him: "He is a very varlet and a knave." *Held*, not actionable: *Cotes v. Kettle*, Cro. Jac. 204.

§ 1261. **Act Referred to must be of or Incident to his Calling.**—The language, to be actionable, must refer to some act or transaction which is a part of or incident to the person's occupation. Thus it has been held actionable to charge that a merchant keeps false books, for a merchant must keep books, and to say of him that he keeps false books must necessarily injure him in the estimation of the public with which he deals.¹ So of a blacksmith, for the keeping of a book of accounts is incident to the business of a blacksmith, and necessary in this country, where credit is usually given as well by the mechanic as by the merchant and professional man.² But to say of a farmer that he keeps false books has been held not actionable.³ This is a different calling, with different modes of dealing. A merchant sells to the public generally; a blacksmith works for the public generally. But a farmer sells his produce in large quantities; he carries it abroad to market; and he delivers it for cash, and not on credit. Books of account are not necessarily incident to his business. Other illustrations of this rule may arise. Thus to say of a painter that he is a poor hand at making a coat, or of a tailor that he never made a boot that fitted, or of a lawyer that he is an execrable musician, would obviously in each case afford no ground of action.

§ 1262. **And must be Applied thereto.**—Where the words have such a relation to the party's occupation that

likewise, it is actionable to impute insolvency to a trader, which affects his credit; but the words in this case are applicable as well to a man not in trade as to a trader, and are not, therefore, actionable as referable to the plaintiff's trade."

¹ *Backus v. Richardson*, 5 Johns. 476.

² *Burtch v. Nickerson*, 17 Johns. 216; 8 Am. Dec. 390.

³ *Rathbun v. Emigh*, 6 Wend. 407.

they directly tend to injure him in respect to it, they are actionable,¹ although not applied by the speaker to that occupation; but when they convey only a general imputation upon his character, equally injurious to any one, they are not actionable unless such application be made.² Thus in a New York case,³ the plaintiff had been employed as clerk by the firm of B. & M. On leaving them he was employed by C. Subsequently B. said to C. that the plaintiff had become such a notorious liar that he could place no confidence in him; that he had strong cause to doubt his honesty. The words were held actionable. "The idea," said the court, "that a man may speak to a merchant about the dishonesty of one employed by him, and be able to separate the charge of dishonesty from his acts as clerk, and place them upon the individual only in his private relations, is delusive." So to charge that a merchant or a trader cannot pay his debts is actionable, though his mercantile debts are not expressly referred to. Insolvency is necessarily connected with trade. If a man cannot pay his private debts, he cannot pay his mercantile debts. The damage is the same in either case; for if a merchant be incapable of paying all his debts, whether in or out of the trade, his mercantile credit, which depends on his general solvency, must be injured.⁴

ILLUSTRATIONS.—A was a brewer. B said of him: "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound." It was not shown that the words were spoken of him in his business. *Held*, actionable: *Stanton v. Smith*, 2 Ld. Raym. 1480. J. was a brewer, and L. said: "I will bet five pounds to one pound that J. was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Admitting that the words were spoken of him in his private character, they were *held* actionable: *Jones v. Littler*, 7 Mees. & W. 423. D. was a merchant, and R. said of him: "He was

¹ *Fowles v. Bowen*, 30 N. Y. 20.

³ *Fowles v. Bowen*, 30 N. Y. 20.

² *James v. Brook*, 9 Q. B. 7; *Sander-son v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105.

⁴ See cases *post*.

broke." The declaration charged that the words were spoken of and concerning him, without adding "as a merchant." *Held*, sufficient: *Davis v. Ruff*, Cheves, 17; 34 Am. Dec. 584. J. was a superintendent of police. B. said of him: "He has been guilty of conduct unfit for publication," but not that it was in the course of his office. *Held*, not actionable: *James v. Brook*, 9 Q. B. 7. The defendant published a newspaper article stating in substance that the body of a man, apparently frozen to death, had been found in a highway; that the plaintiff as coroner was proceeding to hold an inquest on it, when a physician, after a careful examination, pronounced the man alive, and after some twenty-four hours' labor, restored him to consciousness. The plaintiff was also a physician, but the article said nothing of his professional character. *Held*, not actionable *per se*: *Purdy v. Rochester Printing Co.*, 96 N. Y. 372; 48 Am. Rep. 632.

§ 1263. **Charge as to Particular Transaction not Actionable — Exception.** — As the charge must be of something that affects generally the character of the party in his occupation, words imputing want of skill or ignorance in a particular transaction are not actionable *per se*.¹ In *Poe v. Dr. Mendford*,² the leading case on this point, P. was a physician, and M., another physician, said of him: "P. hath killed Mr. A with physic, which physic was a pill, and the vomit was found in his mouth, and Dr. B and Dr. C were there, and found it so, and it is true." Coke, for the defendant, argued that the action would not lie, because a physician might involuntarily kill a patient, not knowing the disease, and yet no discredit would attach

¹ *Rodgers v. Kline*, 56 Miss. 808; 31 Am. Rep. 389; *Gunning v. Appleton*, 58 How. Pr. 471. "A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskillfulness; and where charges are made against a physician that fall within this class of cases, they are not actionable without proof of special dam-

ages": *Mason, J.*, in *Secor v. Harris*, 18 Barb. 425. "Can it be contended that it is actionable to say of a lawyer that he will not pay his debts, much less a particular debt? I am not sure it would be actionable to say of a lawyer, falsely, that he would not pay some particular money collected by him as a lawyer, or that it would be actionable to say of a blacksmith, untruly, that he had burned a certain horse in shoeing him": *McCay, J.*, in *Van Epps v. Jones*, 50 Ga. 238.

² *Cro. Eliz.* 589.

to him. And all the judges agreed that the action lay not, "for it cannot be any discredit to a physician to say that he killed one with physic; it is a usual and common expression, and it may be without any default in him, for they may mistake the diseases in their own bodies, much more in others, and apply wrong medicines, which may be the cause of the patient's death, and yet no discredit unto them." This old case was approved and followed in New York in 1811.¹ In this case the defendant was sued for having said of the plaintiff, an attorney, that he knew nothing about a certain suit. It was held that the words were not actionable, the court saying: "There is not an instance in the books which we have met with of a suit sustained for words charging a professional man with ignorance in a particular case. To carry the right of action so far would be unnecessary for the protection of any profession, and would be an unreasonable check upon the freedom of discussion. There is no physician, however eminent, who is not liable to mistake the symptoms of a particular disease, nor any attorney who may not misunderstand the complicated nature and legal consequences of a particular litigation." So it is not actionable *per se* to say of a physician that he acted hastily in amputating an arm, and did not make the amputation on his own judgment, or that he had better have cut off the left arm than the right.² But the rule is otherwise if the specific act charged is of so grave a nature as necessarily to injure the general reputation of the plaintiff in his calling or profession. In *Sumner v. Utley*,³ the plaintiff was a physician, and the defendant said of him, in reference to the case of a woman whom he had attended at her confinement, when she was delivered of twins, both she and the offspring dying shortly afterwards: "He has killed three, and ought to be hung, — damn him. They

¹ Foot v. Brown, 8 Johns. 66.

³ 7 Conn. 258.

² Lynde v. Johnson, 39 Hun, 12.

all died through his mismanagement. I have understood he left the afterbirth, and a man that would do that ought to be hung." Subsequently one Mrs. H. having employed the plaintiff, the defendant said to her: "He was the means of your sickness by cutting an artery in your head. Damn him, you ought not to pay him a cent. If Mr. H. had took him up for it, it would have cost him four hundred dollars. It ought to be put in the newspaper." It was held that though the charge was of mismanagement in a particular case it was nevertheless of so gross nature as to injure the general professional reputation of the plaintiff, and was consequently actionable.¹

¹ "I readily admit," said Hosmer, C. J., in delivering the opinion of court, "that falsehood may be spoken of a physician's practice in a particular case, ascribing to him only such a want of information and good management as is compatible with great general knowledge and skill in his profession; and that when such a case arises, unless some special damage exists, his character will be considered as unhurt, and no damages will be presumed. But, on the other hand, it is indisputably clear that a calumnious report concerning a physician in a particular case may imply gross ignorance and unskillfulness, and do him irreparable damage. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of a medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather proof of human imperfection than of culpable ignorance or unskillfulness. On the contrary, a single act or omission of his may evince gross ignorance, and such a deficiency of skill as will not fail to injure his reputation, and deprive him of general confidence. If he were called on to administer to one manifestly intoxicated, and treat his disease as if it were an apoplexy, no person of good sense after knowledge of this would employ him in his profession. These remarks have a more striking application to the business of a surgeon or

man midwife. While a physician exercises a profession often beset with great difficulties, the employment of a man midwife and surgeon, for the most part, is merely mechanical. If a surgeon were requested to take blood from a person, and should proceed to this operation by opening an artery instead of a vein, by reason of which he should bleed to death, or if he should amputate a limb without having applied a tourniquet or some other compression of the main arteries, and the person practiced on should die in his hands from loss of blood,—who would afterward employ him? So if a man midwife should deliver a woman and leave the afterbirth, whatever may have been the ancient practice, would it not in the present state of the art exhibit such powerful proof of ignorance and want of skill as greatly to injure his general character? On this subject I cannot doubt, and should not be surprised at the harsh declaration of the defendant, if applied to such a one, that 'he ought to be hung.' If a surgeon should be such an arrant bungler in his profession as not to know an artery in the head from a vein, and should puncture the former instead of the latter, would not his reputation as a man of knowledge and skill receive essential damage? Undoubtedly, in all the cases put the stigma of gross ignorance and unskillfulness would justly be applied to him; and his character would sink under the re-

In a subsequent case in New York, *Sumner v. Utley* was followed. The defendant had said of the plaintiff, a physician: "Dr. S. killed my children; he gave them teaspoonful doses of calomel, and they died. Dr. S. gave them teaspoonful doses of calomel, and it killed them. They did not live long after they took it; they died right off, the same day." It was held that the words were action-

proach. As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the defendant, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice until his reputation would be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces; and the only difference would consist in the manner of effecting the same result. The redress proposed on the proof of special damage is inadequate to the case. Much time may elapse before the fact of damage admits of any evidence; and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies. . . . I think that prejudice to the plaintiff in his profession, as the natural and probable consequence of the words, must inevitably result. That the defendant intended to impute to the plaintiff, by the words spoken, the most monstrous and culpable ignorance and mismanagement, it is impossible for me to doubt. Surely he would not have execrated him, and declared that he ought to die an ignominious death, and that his practice ought to be published in a newspaper, if he meant nothing more than what the defendant would have the court suppose; that is, to impute to the plaintiff the common imperfections of humanity. On the contrary, every person of sense

or reflection who should believe the imputations cast upon him would consider him as a man of ignorance and unskillfulness, and unworthy of confidence. And this impression would be deepened by the expression that the plaintiff was liable to heavy damages; for it has often been decided that nothing short of gross ignorance and want of skill will authorize a suit against a practicing physician. What woman would trust herself in such hands, with full information that three persons had perished under his culpable mismanagement? Or what person would employ as a surgeon the man who ought to be hung for cutting an artery? I would frown on every action of slander brought to gratify a petulant and quarrelsome disposition, but when the reputation of a skillful man is assailed by wanton calumny, I shall ever be disposed to go to the full length of principle to afford him adequate redress." Peters and Lauman, JJ., concurred in the judgment of the chief justice. Daggett, J., dissented, being of opinion that the words did not impute to the physician ignorance or malpractice in his profession generally. "I cannot," said he, "so understand them. They are employed only about his treatment of a pregnant woman and her twin children, — one dead at the birth, and the other dying with its mother soon after its birth. As this idea seems to be embraced by my brethren and to influence their opinions, I have looked with attention into that part of the declaration brought into view by this motion, and it strikes me as entirely silent, except as to the plaintiff's management in the case stated, and not to impute any ignorance except in the management of this particular case."

able *per se*.¹ Words imputing a want of integrity, whether used in reference to a man's general conduct or to his behavior in a particular case, are of course equally actionable.

ILLUSTRATIONS. — C. was a physician who had treated a female patient, one S. M. said of him: "If Dr. C. had continued to treat her, she would have been in her grave before this time. His treatment of her was rascally." *Held*, not actionable: *Camp v. Martin*, 23 Conn. 86. The words alleged were: "You are a thief, a rogue, and a robber, and I can prove it." There was evidence tending to show that plaintiff had gone into defendant's house in his absence, and taken a boy away by force for an alleged crime, and in the affair used harsh language to and greatly terrified defendant's wife, with whom he was unacquainted. Returning a few moments later, defendant, finding his wife much excited, and learning the cause, went to plaintiff for an explanation, and, according to some of the testimony, was received with insult, whereupon a quarrel ensued, in which he used the language complained of. The court charged that if defendant's language was a mere outburst of passion, induced by plaintiff's conduct towards his wife and himself, and was neither intended nor understood by the bystanders to charge plaintiff with the commission of a crime, they should find for defendant, *Held*, proper: *Ritchie v. Stenius*, Mich., 1889.

§ 1264. **Comparison as to Merits not Actionable.** — But comparisons made between professional men, and opinions publicly expressed of their relative merits, are not actionable, even although they cause damage. For example: A is an attorney. B has employed him in certain trans-

¹ *Secor v. Harris*, 18 Barb. 425. But Mason, J., who delivered the opinion of the court, misapprehended the scope of the ruling in *Sumner v. Utley*. He evidently entertained the idea that both *Poe v. Dr. Mendford* and *Foot v. Brown* had been overruled in that case, together with the general principle which they established. But in *Poe v. Dr. Mendford* and *Foot v. Brown* it was decided that the language in each case respectively imputed simply a want of skill in a particular transaction. The question in *Sumner v. Utley* was, whether the

words charged the physician with mere ignorance in a particular case, or with a want of general professional knowledge and skill. On this, as we have seen, the judges differed, but they did not differ as to the principles of the law of slander. The chief justice and the majority of the court thought that the words did impute to the plaintiff general incompetence in his profession, the dissenting judge that they did not. It was the application of a legal rule, and not its existence or propriety, that was determined in *Sumner v. Utley*.

actions for him, but overhearing C say, "D is a much better lawyer than A," he takes away his business from A and gives it to D. Again, E is a physician, and F says of him, "He is nowhere as a doctor compared to G," whereby H employs G instead of E, as he had intended to do. Here are words spoken of persons in their respective professions, which not only tend to their injury, but actually do them damage, yet they do not render the speakers liable to suits for damages.

§ 1265. Other Words not Actionable Except in Case of Special Damage.—No other words except those mentioned in the three last divisions¹ are actionable *per se*. Thus to accuse a man of fraud, dishonesty, immorality, or any vicious and dishonorable (but not criminal) conduct, or to otherwise make a charge calculated to wound his feelings or disgrace him, is not actionable, unless it has produced as its natural and necessary consequence some pecuniary loss to the plaintiff.² Therefore it is not actionable *per se* to say of a man, "Thou art a scurvy bad fellow";³ or that he is a swindler;⁴ or to charge a man with immorality or adultery,⁵ or drunkenness,⁶ or that he is insane,⁷ or that he, a government employee, spoke disrespectfully of the Secretary of the Treasury and others of

¹ See §§ 1246–1248.

² See *ante*, §§ 1246, 1247; *Alfele v. Wright*, 17 Ohio St. 238; 93 Am. Dec. 615. But in Ohio, on sentimental grounds apparently, the plaintiff being a young woman, it was held actionable *per se* to call a person a hermaphrodite: *Malone v. Stewart*, 15 Ohio, 319; 45 Am. Dec. 577; *Alfele v. Wright*, 17 Ohio St. 238; 93 Am. Dec. 615. See *Abrams v. Foshee*, 3 Iowa, 274, 66 Am. Dec. 77, where this case is criticised. And in the South in slavery times, it was held that to charge a white person with being a mulatto, or having negro blood in him, was actionable *per se*, because it degraded him: *Elden v. Legore*, 1 Bay, 171;

Wood v. King, 1 Nev. & M. 184; *Atkinson v. Hartley*, 1 McCord, 203. In Michigan, in a recent case, words charging a wife with deserting her husband in his sickness were held actionable *per se*, in connection with words forbidding all persons to give her harbor or trust on her husband's account: *Smith v. Smith*, Mich., 1889.

³ *Fisher v. Atkinson*, 1 Rolle Abr. 43.

⁴ *Black v. Hunt*, 2 L. R. Ir. 10.

⁵ *Ayre v. Craven*, 2 Ad. & E. 2; *Lumby v. Allday*, 1 Crompt. & J. 301; *Brayne v. Cooper*, 5 Mees. & W. 249.

⁶ *Seevy v. Viall*, R. I., 1889.

⁷ *Count Joannes v. Burt*, 6 Allen, 236; 83 Am. Dec. 625.

his superiors;¹ or charging that a person without consideration obtained notes from one whose mental condition incapacitated him for business;² or to say of one that he is a man of bad character, in the neighborhood in which he lives, as regards truth and veracity, and that the speaker would not believe him on oath;³ or charging one with being a bastard;⁴ or charging a woman with being an inhuman step-mother, and with beating her child over the head unmercifully with a club;⁵ or that B, a woman, had a child, and that A took it away and buried it;⁶ or charging that "on the night the ballot-boxes were stolen from the sheriff's office defendant was up-town, . . . and saw plaintiff sitting on the court-house steps at nine o'clock at night";⁷ or charging that the plaintiff administered morphine to another on the day he made his will, and that if it had not been for that the plaintiff's daughters would not have got what they did.⁸ In a late case, the defendant charged the plaintiff with "bearing down" the scales when defendant's stock was weighed, and "lifting up" when plaintiff's was weighed. The first part of the charge imputed an act of wanton mischief which was of no

¹ *Knight v. Blackford*, 3 Mackey, 177, 51 Am. Rep. 772, the court saying: "Suppose I should go to the Secretary of the Treasury, and say to him that a certain clerk in his department was in affluent circumstances and did not need office, and that I, on the other hand, did need it; that the Secretary should turn him out on the strength of that statement, and put me in. That would be a damaging statement on my part, and yet no action for slander could be based upon it. So that the question which meets us on the threshold of the case is, whether the words alleged in this declaration were defamatory and scandalous. It will be observed that the defendant is not charged with saying anything about the plaintiff's character, but with saying that the plaintiff disparaged somebody's else character; that is to say, that of the Secretary of the Treasury, and that of some of his sub-

ordinates. It is not even complained that the defendant accused the plaintiff of falsehood in making these charges against the Secretary and others. If they were true, the plaintiff would have had a right to make them. The declaration does not complain that the defendant even imputed false statements to the plaintiff, much less any more serious moral delinquency. The words, therefore, do not disparage the character of the plaintiff at all, and we cannot conceive how an action can be grounded upon allegations that impute nothing wrong."

² *Trimble v. Anderson*, 79 Ala. 514.

³ *Studdard v. Trucks*, 31 Ark. 726.

⁴ *Hoar v. Ward*, 47 Vt. 657.

⁵ *Geisler v. Brown*, 6 Neb. 254.

⁶ *Young v. Cook*, 144 Mass. 38.

⁷ *Long v. Musgrove*, 75 Ala. 158.

⁸ *McFadin v. David*, 78 Ind. 445; 41 Am. Rep. 587.

benefit to plaintiff, and hence was not a charge of fraud; and the offense of using false pretenses was not charged, unless it was stated that plaintiff was weigh-master, and had charge of the weighing.¹ Words imputing unchastity or adultery to a woman, married or unmarried, however gross and injurious they may be, are not actionable, unless she can prove that they have directly caused her special damage;² nor to charge a young woman with self-pollution.³

¹ Wilkin v. Tharp, 55 Iowa, 609.

² Lynch v. Knight, 9 H. L. Cas. 577; Roberts v. Roberts, 5 Best & S. 384; Allsop v. Allsop, 5 Hurl. & N. 534; Shafer v. Ahalt, 49 Md. 171; 30 Am. Rep. 456. The word "bitch," when applied to a woman, does not, in its common acceptation, import whoredom in any of its forms, and therefore is not slanderous *per se*: Schurick v. Kollman, 50 Ind. 336. But the word applied to a woman, where it was

meant and understood to impute whoredom, is actionable *per se*: Logan v. Logan, 77 Ind. 558. To say of a married woman that she is pregnant, or that she "is in a fix" (meaning by local usage that she is pregnant), is not actionable, but if spoken of an unmarried female, such words are actionable: Acker v. McCullough, 50 Ind. 447. See *ante*, Words Charging Crime.

³ Anonymous, 60 N. Y. 262; 19 Am. Rep. 174.

CHAPTER LXVI.

LIBEL.

- § 1266. Libel defined — Form of.
- § 1267. What libelous words are actionable.
- § 1268. Aliter — Not libelous.
- § 1269. Libels on holders of offices.
- § 1270. Libels on professional men.
- § 1271. Clergymen.
- § 1272. Journalists and newspapers.
- § 1273. Lawyers.
- § 1274. Medical men.
- § 1275. Libels on merchants and traders.
- § 1276. When libel on thing a libel on the individual.
- § 1277. Slander of title.
- § 1278. Slander of goods.
- § 1279. Other cases.

§ 1266. **Libel Defined — Form of.** — Slander is oral defamation. Libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.¹ The writing may be on paper, parchment, copper, wood, or stone, or on any kind of substance in fact, and may be made with any instrument, pen and ink, black lead-pencil,² or in chalk or paint.³ So any mark or sign exposed to view, and conveying a defamatory meaning, is a libel; as, an anagram or an allegory,⁴ burning in effigy,⁵ a caricature or scandalous painting,⁶ a chalk-mark on a wall,⁷ a gallows placed before a man's door,⁸ or an effigy,⁹ or hieroglyphics,¹⁰ or ironical praise,¹¹ or a picture,¹² or a rebus,¹³ or a statue,¹⁴ or a notice of the death of a living

¹ Cooley on Torts, 193.

² Geary v. Physic, 5 Barn. & C. 238.

³ Odgers on Libel and Slander, 7.

⁴ Odgers on Libel and Slander, 8.

⁵ Odgers on Libel and Slander, 9.

⁶ Anon., 11 Mod. 99; Austin v. Culpepper, 2 Show. 313; Du Bost v. Beresford, 2 Camp. 511.

⁷ Mortimer v. McCallan, 6 Mees. & W. 58.

⁸ Odgers on Libel and Slander, 8.

⁹ 5 Rep. 125.

¹⁰ Odgers on Libel and Slander, 8.

¹¹ Odgers on Libel and Slander, 8.

¹² 5 Rep. 7. As a picture representing a man "playing at cudgels" with his wife: Anon., 11 Mod. 99.

¹³ Odgers on Libel and Slander, 8.

¹⁴ Hawk. P. C. 542.

person, published maliciously, and calculated to subject the person to ridicule.¹

ILLUSTRATIONS.—The defendant set up a lamp on the wall adjoining the plaintiff's dwelling-house, and kept it burning in the daytime, thereby inducing the passers-by to believe that plaintiff's house was a brothel. *Held*, a libel in effigy: *Jefferies v. Duncombe*, 2 Camp. 3; 11 East, 226. A railroad company supplied its agents with a list of discharged employees, stating the reasons for discharge. The reason in one case stated was "stealing," and the charge was unfounded. *Held*, a libelous publication: *Bacon v. R. R. Co.*, 55 Mich. 224; 54 Am. Rep. 372. The following written charge was published by A: "Charge 4. Refusing to correct George C. in his statement as a witness before Esq. B, when I believe he (J. C.) knew his (George's) statement was not true." *Held*, a libel by the writer on George C.: *Coombs v. Rose*, 8 Blackf. 155.

§ 1267. **What Libelous Words are Actionable.**—A libel is any publication (not oral) which exposes the person complaining to hatred, contempt, ridicule, or obloquy, or tends to injure him in his trade or calling, impairs his standing in society, or causes him to be shunned or avoided by his neighbors.² Thus it has been held libelous to write or print of a man that he, a Presbyterian, was guilty of "gross intolerance" in not allowing his hearse to be used at the funeral of his Roman Catholic

¹ *McBride v. Ellis*, 9 Rich. 313; 67 Am. Dec. 553.

² *Cropp v. Tilney*, 3 Salk. 226; *O'Brien v. Clement*, 15 Mees. & W. 435; *Villers v. Monsley*, 2 Wils. 403; *Colby v. Reynolds*, 6 Vt. 489; 27 Am. Dec. 574; *Fonville v. McNease*, Dud. (N. C.) 303; 31 Am. Dec. 556; *Obaugh v. Finn*, 4 Ark. 110; 37 Am. Dec. 773; *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768; *White v. Nichols*, 3 How. 266; *Armentrout v. Moranda*, 8 Blackf. 426; *Torrance v. Hurst*, 1 Miss. 403; *Newbraugh v. Curry*, Wright, 47; *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 281; *Commonwealth v. Clap*, 4 Mass. 163; 3 Am. Dec. 212; *Dexter v. Spear*, 4 Mass. 115; *Bergmann v. Jones*, 94 N. Y. 51; *Huse v. Inter-Ocean Company*, 12 Ill. App. 627; *Holly v. Gregg*, 74 Iowa, 563; *Adams*

v. Lawson, 17 Gratt. 250; 94 Am. Dec. 455. "Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling, or trade. And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society": *Odgers on Libel and Slander*, 22.

servant;¹ that he is "the most artful scoundrel that ever existed," "is in every person's debt," and that "his ruin cannot long be delayed," and that "he is not deserving of the slightest commiseration";² that he is the author of a false and malicious report in circulation in the town in which he lives;³ that he is about to commence a suit for libel, but that he will not like to bring it to trial in a particular county, "because he is known there";⁴ that he sought admission to a club, and was blackballed, and bolted the next morning without paying his debts;⁵ that "his slanderous reports nearly ruined some of our best merchants";⁶ that "he did a good thing in his sober moments, in the way of collecting soldiers' claims against the government for a fearful percentage; the blood-money he got from the boys in blue in this way is supposed to be a big thing";⁷ that "he appears to have been in collusion with ruffians";⁸ that he is "an imp of the Devil, and cowardly snail";⁹ is a "black-leg";¹⁰ is a "black sheep";¹¹ a black-mailer;¹² cheats at dice and on the turf;¹³ that he was convicted of libel, and sentenced to prison therefor;¹⁴ that he is a "convicted felon";¹⁵ that he is cruel to his wife, who has summoned him before the magistrates;¹⁶ that he is a "defaulter";¹⁷ that he "has been deprived of a participation in the chief ordinance of the church to which he belongs, and that, too, by reason of his infamous, groundless assertions";¹⁸ that he is a

¹ *Teacy v. McKenna*, 4 Ir. C. L. Rep. 374.

² *Rutherford v. Evans*, 6 Bing. 451; 8 L. J. C. P. 86.

³ *Colby v. Reynolds*, 6 Vt. 489; 27 Am. Dec. 574.

⁴ *Cooper v. Greeley*, 1 Denio, 347.

⁵ *O'Brien v. Clement*, 16 Mees. & W. 159; 4 Dowl. & L. 343.

⁶ *Cramer v. Noonan*, 4 Wis. 231.

⁷ *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105.

⁸ *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314.

⁹ *Price v. Whitely*, 50 Mo. 439.

¹⁰ *McGregor v. Gregory*, 11 Mees. & W. 287; *O'Brien v. Clement*, 16 Mees. & W. 166; *Barnett v. Allen*, 1 Fost. & F. 125.

¹¹ *Id.*

¹² *Robertson v. Bennett*, 44 N. Y. Sup. Ct. 66.

¹³ *Greville v. Chapman*, 5 Q. B. 731.

¹⁴ *Boogher v. Knapp*, 8 Mo. App. 591; 76 Mo. 457.

¹⁵ *Leyman v. Latimer*, L. R. 3 Ex. Div. 15, 352.

¹⁶ *Hakewell v. Ingram*, 2 C. L. Rep. 1397.

¹⁷ *Bruton v. Downes*, 1 Fost. & F. 668.

¹⁸ *McCorkle v. Binns*, 5 Binn. 340; 6 Am. Dec. 420.

desperate adventurer;¹ that he is "a dishonest man";² that he had "disappeared with some of his employer's funds, and the police had been notified";³ that he has been dismissed for alleged thefts, followed by a comment that the rascal ought to feel thankful to get off so cheaply;⁴ that he put in a distress in order to help his insolvent tenant to defraud his creditors;⁵ that he is a drunkard, a cuckold, and a tory;⁶ that he drove over a lady and killed her, and yet attended a public ball that very evening;⁷ that he is a felon editor;⁸ that he is "a frozen snake";⁹ that he is a skunk;¹⁰ that he (a general railroad passenger agent) had grown rich by making local ticket agents divide their commissions with him;¹¹ that the grand jury have found a true bill against him for a crime;¹² that he has committed adultery, and that the case seems from the current report to be one of rape;¹³ that he is a hypocrite, and that under the cloak of hypocrisy he oppresses widows and orphans;¹⁴ that he grossly insulted two ladies;¹⁵ that he is "at the head of a gang of swindlers," that he is "a common informer, and has been guilty of deceiving and defrauding divers persons with whom he had dealings";¹⁶ that he is "a hypocrite";¹⁷ that he is

¹ *Wakeley v. Healey*, 7 Com. B. 591.

² *Austin v. Culpepper*, Skin. 124; 2 Show. 314.

³ *Mallory v. Pioneer-Press Co.*, 34 Minn. 521.

⁴ *Dwyer v. Fireman's Journal Co.*, 11 Daly, 248; *Ryer v. Fireman's Journal Co.*, 11 Daly, 251.

⁵ *Haire v. Wilson*, 9 Barn. & C. 643; 4 Moody & R. 605.

⁶ "I never yet saw the man who liked to be considered a sot or drunkard. Noah, the first drunken man, became thereby an object of ridicule to his own son. It was the third part of the then male world that manifested this mockery for this habit, and the other two thirds did but conceal it. . . . But this paper did not stop with imputing excessive debauchery to old man Thompson; it alleges further that he was decoyed into his cups for the purpose of being

made a cuckold. If this charge would not expose him to universal scorn and contempt, I know not what would": *Giles v. State*, 6 Ga. 276.

⁷ *Churchill v. Hunt*, 1 Chit. 480; 2 Barn. & A. 685.

⁸ *Leyman v. Latimer*, L. R. 3 Ex. Div. 15, 352.

⁹ *Hoare v. Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

¹⁰ *Massuere v. Dickens*, 70 Wis. 83; *Pledger v. State*, 77 Ga. 242.

¹¹ *Shattuc v. McArthur*, 25 Fed. Rep. 133; 29 Fed. Rep. 136.

¹² *Harvey v. French*, 1 Crompt. & M. 11.

¹³ *Lowe v. Herald Co.*, Utah, 1889.

¹⁴ *Jones v. Greeley*, Fla., 1889.

¹⁵ *Clement v. Chivis*, 9 Barn. & C. 172.

¹⁶ *J'Anson v. Stuart*, 1 Term Rep. 748; 2 Smith's Lead. Cas., 6th ed., 57.

¹⁷ *Thorley v. Lord Kerry*, 4 Taunt. 355; 3 Camp. 214, note.

“an impostor”;¹ that he is insane;² that he is insolvent, and cannot pay his debts;³ that he is “an infernal villain”;⁴ that he is guilty of “ingratitude”;⁵ that he is an itchy old toad;⁶ or is a mere man of straw;⁷ that in his capacity of a juror he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under their consideration upon a game of draughts;⁸ that he is a miserable fellow; that it is impossible for a newspaper article to injure him to the extent of six cents; that the community could hardly despise him worse than they do now;⁹ that he was “once in difficulties,” though now out of them;¹⁰ that he has committed perjury;¹¹ that he had been paid five thousand dollars in cash for procuring the appointment of an inspector of pork in the city of New York by the governor, and that large sums had been paid to him for other lucrative offices;¹² that “B. would put his name to anything that T. would request him to sign that would prejudice D.’s character”;¹³ that a prostitute is under his protection and patronage;¹⁴ that he is “a rogue and a rascal”;¹⁵ that “I look upon him as a rascal, and have watched him for many years”;¹⁶ that his house had been searched under legal process for stolen goods supposed to be secreted therein;¹⁷ that there are “suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men”;¹⁸ that he is a swine;¹⁹ that

¹ *Cooke v. Hughes*, Ryan & M. 112; *Campbell v. Spottiswoode*, 3 Best & S. 769; 11 Week. Rep. 569; 8 L. T. 201.

² *Southwick v. Stevens*, 10 Johns. 443.

³ *Met. O. Co. v. Hawkins*, 4 Hurl. & N. 146.

⁴ *Bell v. Stone*, 1 Bos. & P. 331.

⁵ *Cox v. Lee*, L. R. 4 Ex. 284.

⁶ *Villers v. Monsley*, 2 Wils. 403.

⁷ *Eaton v. Johns*, 1 Dowl., N. S., 602.

⁸ *Commonwealth v. Wright*, 1 Cush. 46.

⁹ *Brown v. Remington*, 7 Wis. 462.

¹⁰ *Cox v. Lee*, L. R. 4 Ex. 284.

¹¹ *Slile v. Nokes*, 7 East, 493; *Hillhouse v. Dunning*, 6 Conn. 391; *Mal-lerich v. Mertz*, 19 La. Ann. 194; *Haws v. Stanford*, 4 Sneed, 520.

¹² *Weed v. Foster*, 11 Barb. 203.

¹³ *Duncan v. Brown*, 15 B. Mon. 186.

¹⁴ *More v. Bennett*, 48 N. Y. 472.

¹⁵ *Per Gould J.*, in *Villers v. Mons-ley*, 2 Wils. 403.

¹⁶ *Williams v. Karnes*, 4 Humph. 9.

¹⁷ *State v. Smily*, 37 Ohio St. 30; 41 Am. Rep. 487.

¹⁸ *Broad v. Deuster*, 8 Biss. 265.

¹⁹ *Solverson v. Peterson*, 64 Wis. 198; 54 Am. Rep. 607.

a horse was stolen, and "the thief is believed to be one S. of Belle Plaine";¹ that "he is thought no more of than a horse-thief and a counterfeiter";² that he is a "truck-master";³ that he has sued his mother-in-law;⁴ that he, a church member, disturbs the peace of the church by circulating false statements about the pastor, and censuring him therefor;⁵ that he voted twice on the same ballot for the election of state officers;⁶ that he is unfit to be trusted with money.⁷

And it is libelous to say of a woman that her husband is petitioning for a divorce from her;⁸ that she is insane, or that her mind is affected;⁹ that she is illegitimate;¹⁰ that she has her photograph taken incessantly, morning, noon, and night, and receives a commission on the sale of such photographs;¹¹ that she, defendant's sister, unnecessarily made him a party to a chancery suit, adding, "it is a pleasure to her to put me to all the expense she can";¹² that she, a lady applying for relief from a charitable society, is unworthy, and she spends all the money given her by the benevolent in printing circulars filled with abuse of the society's secretary.¹³ Publishing a statement as being voluntarily given to a newspaper by the plaintiff that her mother had been bitten by a cat, and would purr and mew and get down on the floor to catch rats like a cat, and would hate the sight of water, but that she had been cured by a certain medicine sold by the defendant, called "S. S. S.," is a libelous publication of such person.¹⁴

¹ *Simmons v. Holster*, 13 Minn. 249.

² *Nelson v. Musgrave*, 10 Mo. 648.

³ *Homer v. Taunton*, 5 Hurl. & N. 661.

⁴ *Cox v. Cooper*, 12 Week. Rep. 75.

⁵ *Over v. Hildebrand*, 92 Ind. 19.

⁶ *Walker v. Winn*, 8 Mass. 248.

⁷ *Cheese v. Scales*, 10 Mees. & W. 488.

⁸ *R. v. Rosenberg*, *Odgers on Libel and Slander*, 24.

⁹ *Morgan v. Lingen*, 8 L. T., N. S., 800.

¹⁰ *Shelby v. Sun Printing Co.*, 38 Hun, 474.

¹¹ *R. v. Rosenberg*, *Odgers on Libel and Slander*, 23.

¹² *Fray v. Fray*, 17 Com. B., N. S., 603; 34 L. J. C. P. 45.

¹³ *Hoare v. Silverlock*, 12 Q. B. 624; 17 L. J. Q. B. 306; 12 Jur. 695.

¹⁴ *Stewart v. Swift Specific Co.*, 76 Ga. 280; 2 Am. St. Rep. 40.

ILLUSTRATIONS. — “Digby has had a tolerable run of luck. He keeps a well-spread sideboard, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of écarté or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession.” *Held*, libelous: *Digby v. Thompson*, 4 Barn. & Adol. 821; 1 Nev. & M. 485. “Hurricane Vote. — Again we have to chronicle most atrocious corruption, intimidation, and fraud in the Hurricane Island vote, for which Davis Tillson is, without doubt, responsible, as he was last year.” *Held*, actionable: *Tillson v. Robbins*, 68 Me. 295; 28 Am. Rep. 50. A newspaper published an account of the suicide of a man, falsely charging, in effect, that it was induced by the exactions of his wife, and by her fraudulent conduct in taking wages for her son which he had not earned. *Held*, libelous: *Bradley v. Cramer*, 59 Wis. 309; 48 Am. Rep. 511. “To W. L. T.: You are hereby notified that I have made application for a homestead, and the same will come on for hearing at the ordinary’s office December 15, 1876. L. K. W. N. B. Take notice, merchants and community generally, the thieves [meaning the plaintiff] are refusing to pay for rations. W. L. T.” *Held*, libelous: *Tillman v. Willis*, 61 Ga. 433. A public officer published, in a report of an official investigation into his conduct, the following comments upon the testimony of a witness before the commissioners of inquiry: “I am extremely loath to impute to the witness or his partner improper motives in regard to the false accusations against me; yet I cannot refrain from the remark, that if their motives have not been unworthy of honest men, their conduct, in furnishing materials to feed the flame of calumny, has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me.” *Held*, libelous: *Clark v. Binney*, 2 Pick. 113. The editors of a newspaper, speaking of a steamboat agent, called him an impertinent person, and charged him with withholding newspapers which had been intrusted to him for their paper, and warned their friends against sending them any more favors by him. *Held*, a libel: *Keemle v. Sass*, 12 Mo. 499. “‘Our army swore terribly in Flanders,’ said Uncle Toby, and if Toby were here now, he might say the same of some modern swearers; the man [meaning the witness] is no slouch at swearing to an old story.” *Held*, libelous: *Steele v. Southwick*, 9 Johns. 214. A newspaper article concerning the chairman of a political county committee, not a candidate for office, described him as an impudent imposter; charged him with writing an address for money out of a corruption fund; alleged that he was the

recognized champion and professional defender of prostitutes and the lowest criminals, and that he followed his profession solely to make money, and moulded his opinions according to his client's ability to pay. *Held*, libelous: *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367. A newspaper, after alluding to certain outrages perpetrated by "ruffians," proceeded to state that plaintiff, "a young man on the Washington train, who is engaged in selling papers, and who takes every occasion to insult Republican passengers, appears to have been in collusion with the ruffians. On approaching the city he went around to take a vote of the passengers, the object being evidently to spot the Republicans, that the assailants might know who were their friends and who their opponents." *Held*, libelous: *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314. A communication concerning a discharged superintendent of defendant's factory charged embezzlement, unfitness for the position, extravagance, and impracticability. *Held*, libelous: *Manner v. Simpson*, 13 Daly, 156. A publication charged plaintiff, as agent of certain fruit-growers, with corruptly failing properly to exhibit their fruit at a fair, and entering it as his own. *Held*, libelous: *Bettner v. Holt*, 70 Cal. 270. A letter from A to B about C said: "I was unfortunate enough to have him in my employ at one time as a book-keeper. He is a liar. I would not believe him under oath." *Held*, libelous in each of its three sentences: *Hake v. Brames*, 95 Ind. 161. Defendant caused to be circulated printed handbills which charged plaintiff, a dressmaker, with retaining material furnished her to be made into a dress for defendant, and imputed to her the crime of larceny. *Held*, libelous: *Bowe v. Rogers*, 50 Wis. 598. In a newspaper article describing the means by which the stock of a worthless silver mine was by a fraudulent scheme sold for a large sum, the plaintiff was stated to have been employed to prepare the mine by plastering and ingrafting silver ore on the limestone rock, while armed men guarded the entrance to the mine, and it was also stated that the plaintiff was an expert in preparing a mine in this way, and that his services in this regard were as valuable as those of the person through whose influence and standing the stock of the company was sold. *Held*, libelous: *Williams v. Godkin*, 5 Daly, 499. A. published the following in a newspaper: "Whereas R. did make representations to me that it would be impossible for my sister B. to secure the position of teacher" of a certain school, when he then knew that a contract between her and the trustees to teach the school had been made, "and whereas the disappointment occasioned by this misrepresentation of his" aggravated "my" sister's illness, "and further considering the fact that his sister had applied for the same school, I regard this conduct in him as uncalled for, ungentlemanly, and detest-

able, as his statement was fallacious. [Signed] A." *Held*, to charge the utterance of a falsehood, and to be libelous *per se*: *Riley v. Lee*, Ky. 1889. The defendant published in a paper a writing purporting to be a letter from King Kalakaua, which, with the editor's comments, was as follows: "Never go into a lawsuit with A. (the plaintiff) so long as he may be the owner of those books that beat S., J., C., and whoever they might be brought up against, for A. is chiefest among ten thousand, and the one altogether lovely on the swear. We begin to believe that old Kalakaua is no bug-eater, if he is a man-eater, for we met A. under the fish last week in a suit on a plain promissory note for five hundred and eighty-five dollars, and he came very near swearing us into his debt. If Beecher is really desirous of laying out Theodore Tilton in his suit now in progress in New York City, let him send for our friend A." *Held*, libelous: *Gabe v. McGinnis*, 68 Ind. 538. A publication in a newspaper with the heading, "C.'s clutch on his friends, which caused them to trust him, and get left," states, in substance, that he occupied the position of shipping clerk for a mercantile firm, "and has left the city under a cloud"; that the book-keeper of the firm presented a bill to one of its customers, who produced C.'s receipt for it; that C. was thereupon "paid up and discharged"; that he then "went to his friends and borrowed what money he could, went to his boarding-house, and took his valise and clothes away, leaving a board bill unpaid"; that "no one knows where he went"; that "he was a good talker, and caught a number of his friends who had confidence in him," and that "he told marvelous stories of his wealthy uncle who lived in Louisiana." *Held*, *per se* libelous and actionable, without an averment of special damages: *Iron Age Publishing Co. v. Crudup*, 85 Ala. 519.

§ 1268. **Aliter—Not Libelous.**—Mere general abuse and scurrility, however ill-natured and vexatious, is not actionable, whether written or spoken, if it does not convey a degrading charge or imputation.¹ Thus it had been held not libelous to write of one that he endeavored to suppress sedition and discourage conspiracy in Ireland;² that he is a "Man Friday";³ that "H. & S. hereby give notice that they will not receive in payment checks drawn on any of the branches of the C. C. Bank";⁴ that the

¹ *Rice v. Simmons*, 2 Harr. (Del.) 417; 31 Am. Dec. 766.

² *Mawe v. Pigott*, 4 Ir. C. L. Rep. 54.

³ *Forbes v. King*, 1 Dowl. 672; *Hoare v. Silverlock*, 12 Q. B. 626.

⁴ *Capital etc. Bank v. Henty*, L. R. 5 C. P. Div. 514.

plaintiff "figured prominently in some of the squatter riots";¹ that he pleaded the statute of limitation in defense of an action at law;² that he "treated" voters;³ that "we are requested to state that the honorary secretary of the Tichborne Defense Fund is not and never was a captain of the Royal Artillery, as he has been erroneously described";⁴ "Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons using the firm of Goldstein & Co. are reported to this society as improper to be proposed to be balloted for as members thereof";⁵ or to say of a merchant, he has refused to contribute his mite with his fellow-merchants to water the street in front of his store.⁶

ILLUSTRATIONS. — Defendants published and posted in a public club-room the following notice: "The Rev. J. Robinson and Mr. J. R., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded from this room. *Held*, no libel: *Robinson v. Jermyn*, 1 Price, 11. M. had been master at the Walsall Science and Art Institute. His engagement there ceased in June, 1874, and he then started and became master of another school, which was called the Walsall Government School of Art, and was opened in August. In September the following advertisement appeared in a newspaper, signed by the defendants as chairman, treasurer, and secretary of the institute respectively: "Walsall Science and Art Institute. The public are informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." *Held*, no libel: *Mulligan v. Cole*, L. R. 10 Q. B. 549; 44 L. J. Q. B. 153; 33 L. T. 12. E. published of a saloon-keeper: "To get rid of a just claim in court, he set up as a defense the existing prohibitory liquor law. We feel it our duty to make such conduct publicly known, in order to caution beer-brewers and liquor dealers." *Held*, not libelous: *Homer v. Engelhardt*,

¹ *Clarke v. Fitch*, 41 Cal. 472.

² *Bennett v. Williamson*, 4 Sand. 69.

³ *Heilman v. Shanklin*, 60 Ind. 424.

⁴ *Hunt v. Goodlake*, 43 L. J. Com. P. 54; 29 L. T. 472.

⁵ The judgment would have been otherwise had there been an aver-

ment that it was the custom of the society to designate swindlers and sharpers by the term "improper persons to be members of this society"; *Goldstein v. Foss*, 6 Barn. & C. 154; 4 Bing. 489; 2 Car. & P. 252; 2 Younge & J. 146; 1 Moore & P. 402.

⁶ *People v. Jerome*, 1 Mich. 142,

117 Mass. 539. The editor of a newspaper owed the plaintiff money upon an award of arbitrators, in speaking of which and of the plaintiff in an article in his paper he said: "The money will be forthcoming on the last day allowed by the award; but we are not disposed to allow him to put it into Wall Street for shaving purpose before that period." *Held*, not libelous: *Stone v. Cooper*, 2 Denio, 293. A banker remitting the proceeds of a note sent to him for collection appended to his letter the words, "Confidential. Had to hold over for a few days for the accommodation of L. & H.," who were the makers. *Held*, not necessarily libelous, and that their interpretation was a matter for the jury: *Lewis v. Chapman*, 16 N. Y. 369.

§ 1269. **Libels on Holders of Offices.**—To impute to any one holding an office that he is incompetent for the position, or that he is or has been guilty of improper conduct in the office, or is actuated by wicked, corrupt, or selfish motives, is libelous. In the case of libel on an officer, it is libelous to impute past misconduct while in the office, and it is not essential that the plaintiff should still hold the office or exercise the profession.¹ Thus it is libelous to charge that a clerk of court is guilty of corruption and misapplication of money;² that an officer when in office advocated high rates, and when out of office low rates, and was not to be trusted;³ that a financial statement of a county made by the county auditor was false, in that it omitted an item of fifteen thousand dollars, and that it was suspected to be otherwise false; that it was sworn to, and that an officer who would swear to one lie would swear to another;⁴ naming the plaintiff and other senators, and stating: "That money has been used to effect

¹ *Parmiter v. Coupland*, 6 Mees. & W. 105; *Boydell v. Jones*, 4 Mees. & W. 446; *Goodburne v. Bowman*, 9 Bing. 532; *Warman v. Hine*, 1 Jur. 820; *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436; *Eviston v. Cramer*, 47 Wis. 659; *Cramer v. Riggs*, 17 Wend. 209. *Aliter* in case of oral defamation: See preceding chapter. To print of a man that he, while a member of a convention, "openly avowed the opinion that government

had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the Devil" is libelous: *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189.

² *Blagg v. Sturt*, 10 Q. B. 899; *May v. Brown*, 3 Barn. & C. 113; *Warman v. Hine*, 1 Jur. 820.

³ *Cheese v. Scales*, 10 Mees. & W. 488.

⁴ *Prosser v. Callis*, 117 Ind. 105.

some of these railroad laws, we know; we have names, and amounts, and dates, so that there can be no mistake";¹ that a state senator voted against his party, and received from the other party, in consideration of his vote, a profitable contract;² that a judge is corrupt;³ that a judge is destitute of the capacity and attainments necessary for his station, or that he openly abandoned the common principles of truth, or that he sold directly or indirectly the appointment of clerk;⁴ that "never before have we seen the judges of the supreme court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags, and render themselves unfit to hold the balance of justice"; and that "whenever an occasion may offer to serve his fellow-partisans, such a judge will yield to temptation, and the wavering balance will shake";⁵ that a judge on the bench is in partnership with his son, a lawyer, and in that capacity receives compensation from parties to suits in which the judge sits, is libelous;⁶ words tending to impeach the honesty and integrity of jurors in their office;⁷ that a public officer was in a beastly state of intoxication when in the discharge of his duties, and an object of loathing and disgust, blind with passion and rum;⁸ that a court commissioner is "a fit tool and toady of others, and whatever he might do in the future, the past would warrant the depriving him of his office";⁹ that an officer authorized to administer oaths affixed a *jurat* to an affidavit, and certified that the person who signed it was duly sworn, when in fact he was not sworn;¹⁰ that a commissioner of bankruptcy was a

¹ *Wilson v. Noonan*, 23 Wis. 105.

² *Negley v. Farrow*, 60 Md. 158.

³ *Robbins v. Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152.

⁴ *Robbins v. Treadway*, 2 J. J. Marsh. 540; 19 Am. Dec. 152.

⁵ *Matter of Moore*, 63 N. C. 397.

⁶ *Royce v. Maloney*, 58 Vt. 437.

⁷ *Byers v. Martin*, 2 Col. 605; 25 Am. Rep. 755.

⁸ *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102.

⁹ *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 281.

¹⁰ *Turrill v. Dolloway*, 17 Wend. 426.

misanthropist, a violent partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act;¹ that an overseer of the poor is guilty of oppressive conduct towards the paupers;² that trustees of a charity have misappropriated funds;³ that a county school superintendent had, for a money consideration, by the use of his influence, induced the board of education to change the school-books;⁴ that an ex-mayor and a justice of the peace, during his mayoralty, was guilty of partiality and corruption, and displayed ignorance of his duties;⁵ that a person while formerly holding the office of sealer of weights and measures and inspector of scales for a certain city "tampered with" or "doctored" such weights, measures, and scales, for the purpose of increasing the fees of his office;⁶ that a certificated master mariner was drunk and neglected his duties;⁷ that a member of a certain political party, at one of its nominating conventions, offered a certain resolution under the influence of a bribe.⁸ It is not libelous to allege of a husband in charge of a public office that his wife was given work in the office, and paid for it in her maiden name.⁹

ILLUSTRATIONS.—The defendant published in a newspaper called the Leavenworth Daily Times an article concerning the plaintiff, E. R., which article contains, among other things, the following: "Who is E. R., in whose eyes swindling is no crime? He is secretary of the bankrupt Kansas Insurance Company.

¹ *Riggs v. Denniston*, 3 Johns. Cas. 198; 2 Am. Dec. 145.

² *Woodard v. Dowsing*, 2 Man. & R. 74.

³ *Booth v. Briscoe*, L. R. 2 Q. B. 496.

⁴ *Hartford v. State*, 96 Ind. 461; 49 Am. Rep. 185.

⁵ *Parmiter v. Coupland*, 6 Mees. & W. 105; 4 Jur. 701.

⁶ *Eviston v. Cramer*, 47 Wis. 659.

⁷ *Coxhead v. Richards*, 2 Com. B. 569; *Irwin v. Brandwood*, 2 Hurl. & C. 960.

⁸ *Hand v. Winton*, 38 N. J. L. 122, the court saying: "When a citizen undertakes to exercise any of his political privileges, it is certainly his duty to act upon public considerations;

to be influenced in such a matter by pecuniary motives, though it may not be punishable in some cases as a crime, is always disgraceful. Every one who, for a bribe, gives his vote or his influence to a candidate for nomination to a public position does such act in secret, thus showing, by his avoidance of the public gaze, his consciousness of the unworthy part he is playing. Therefore, to print and publish that a man has been guilty of such an act must necessarily be to hold him up to the derision and contempt of the community."

⁹ *Bell v. Sun Printing etc. Co.*, 42 N. Y. Sup. Ct. 567; 3 Abb. N. C. 157.

Less than two years ago he was state commissioner of insurance, and certified under his oath of office that this bankrupt concern was a sound and solvent insurance company, while he knew it was at that very time hopelessly bankrupt. He was forced to leave the office of commissioner of insurance because the *Leavenworth Times* exposed his official crookedness, and compelled him to disgorge eight thousand dollars of the state's money." *Held*, actionable: *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436. Plaintiff was Grand Worthy Chief Templar in a temperance organization, and also secretary of the State Temperance Alliance, and constantly engaged in the duties connected therewith. Defendants published of him that he was "a seducer of innocent girls," and instanced an attempt on his part to debauch and ruin a young school-girl who was at the time a member of his own household. Also, that he was "an arch-hypocrite and scoundrel, who was simply using his talents for money-making purposes, and not through any sincerity in the cause in which he is laboring." *Held*, that each of these charges was actionable *per se*: *Finch v. Vifquain*, 11 Neb. 280. A pamphlet stated that plaintiff was a railroad conductor who was discharged for carelessness. *Held*, that their natural import was that plaintiff was careless in his business and employment as a conductor, and that he was so careless and unworthy of employment at the date of publication, and if it was published falsely and maliciously, was libelous: *Missouri Pacific R. R. Co. v. Richmond*, Tex., 1889.

§ 1270. **Libels on Professional Men.**—To impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has been or is guilty of professional misconduct, is libelous.¹ A charge that the plaintiff was supervising architect of a building, and promised and gave to the defendants work on it for a commission paid him by them, is not actionable in itself,² nor is it libelous to publish of a professional man "that he has removed his office to his house to save expense."³

¹ See also the preceding chapter.

² *Legg v. Dunleavy*, 80 Mo. 558; 50 Am. Rep. 512.

³ *Stewart v. Minnesota Tribune Co.*, Minn., 1889, the court saying: "It is not every false charge against an

individual, though reduced to writing and maliciously published, that will sustain an action for damages. It must appear that the plaintiff has sustained some special loss or damage, following as the necessary or natural

§ 1271. **Clergymen.**—It is libelous to publish of a clergyman that he poisoned foxes on an estate, and had been hung up in effigy in consequence of such “dastardly behavior”;¹ that a clergyman came to the performance of divine service in a towering passion, and that his conduct is calculated to make infidels of his congregation;² that “a serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously”;³ that a Protestant archbishop

and proximate consequence of the publication, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his reputation or business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule in consequence of the publication: *Stone v. Cooper*, 2 Denio, 299; *Cooley on Torts*, 2d ed., 241-243; *Townshend on Slander and Libel*, 121; *Pollock on Torts*, 207. Assuming that the charge was maliciously made, it did not import anything unlawful, disreputable, or unprofessional. A professional man has a perfect moral and legal right to change the location of his office to his house, in his discretion, for any reason satisfactory to himself, whether to save expense or otherwise. What ground is there, then, for the legal interference that the plaintiff has been degraded and injured by the publication? It is not claimed that the charge as published would tend to injure him because the change or the report of a change of his office would diminish his professional business in amount or profits, and no case is made for special damages: 3 Bla. Com. *124; *Terwilliger v. Wands*, 17 N. Y. 60; 72 Am. Dec. 428-433. But it is claimed that the words ‘to save expense’ are, under the circumstances set forth in the complaint, susceptible of a defama-

tory meaning, such as would be calculated to injure plaintiff in his private and professional character and standing in the community, and occasion loss or damage in consequence thereof. But we do not think such inference is warranted, or that the injury complained of could be reasonably construed or contemplated as the natural and proximate consequence of the publication, giving the language used its proper and legitimate interpretation; and the charge itself cannot be expanded or enlarged by simple averment: *Donaghue v. Gaffy*, 53 Conn. 51; *Platto v. Geilfuss*, 47 Wis. 493; *Homer v. Englehardt*, 117 Mass. 540; *Stone v. Cooper*, 2 Denio, 297; *Walker v. Tribune Co.*, 29 Fed. Rep. 829. The allusion to the plaintiff in the article complained of may be conceded to be impertinent and in bad taste, but the law of libel, however salutary as a remedy in proper cases, cannot be invoked to redress every breach of good morals or good manners in newspaper publications respecting individuals.”

¹ *R. v. Cooper*, 3 Q. B. 533; 15 L. J. Q. B. 206.

² *Walker v. Brogden*, 19 Com. B., N. S., 65; *Gathercole v. Miall*, 15 Mees. & W. 319; 15 L. J. Ex. 179. But see *Kelly v. Tinling*, L. R., 1 Q. B. 699.

³ *Edwards v. Bell*, 1 Bing. 403.

attempted to convert a Catholic priest by offers of money and of preferment in the Church of England and Ireland.¹

§ 1272. **Journalists and Newspapers.** — It is libelous to impute to the editor and proprietor of a newspaper that in advocating Christianity among the Chinese he was an impostor, anxious only to put money into his own pocket by extending the circulation of his paper; and that he had published a fictitious subscription list with a view to induce people to contribute;² to call the editor of a newspaper “a libelous journalist”;³ to charge that a newspaper “is alleged to have been started for the purposes of plunder”;⁴ to charge that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing in that page;⁵ to charge the publisher of another paper with being a party to a secret conclave, in which he sold the support and advocacy of his paper to certain corporations for a sum of money;⁶ or that “the editor of the Chronicle has been intoxicated on several occasions, and that, too, after he was elected to the legislature as the champion of prohibition.”⁷ It is not libelous for one newspaper to call another “the most vulgar, ignorant, and scurrilous journal ever published in Great Britain”; but it is libelous to add, “It is the lowest now in circulation; and we submit the fact to the consideration of advertisers”; for that affects the sale of the paper and the profits to be made by advertising.⁸

ILLUSTRATIONS. — Plaintiff, a reporter of another newspaper, sued defendant for publishing an article stating that he, having

¹ Archbishop of Tuam v. Robeson, 5 Bing. 17; 2 Moore & P. 32.

² Campbell v. Spottiswoode, 3 Best & S. 769; 9 Jur., N. S., 1069.

³ Wakley v. Cooke, 4 Ex. 511.

⁴ Hart v. Townsend, 67 How. Pr. 88.

⁵ Russell v. Webster, 23 Week. Rep. 59.

⁶ Fitch v. De Young, 66 Cal. 339.

⁷ State v. Mayberry, 33 Kan. 441.

⁸ Heriot v. Stuart, 1 Esp. 437.

insinuated himself into the good graces of one Thomas, a sergeant of police, learned from him (though the force had been cautioned against giving news to reporters) his private opinion of matters connected with the police department, and carried them to headquarters, causing the officer's suspension. The article further said "that on no other journal in the city [than plaintiff's] could such a thing have been possible," and that "there is not a patrolman on the force who does not sympathize with Thomas, and who does not condemn the reporter who made public a private conversation." The publication was proved and not justified. *Held*, actionable: *Tryo v. Evening News Association*, 39 Mich. 636.

§ 1273. **Lawyers.**—It is libelous to publish of a lawyer "that he edited the third edition of a law-book which it is proved is full of inaccuracies";¹ that his conduct in a particular case is to be compared to that of the celebrated firm of Quirk, Gammon, and Snap;² that he, an attorney, is an "honest lawyer" (ironically);³ that his conduct in a certain case was "shameful";⁴ that he is a "shyster";⁵ that he is an "imposter" and a "quack lawyer and mountebank";⁶ that a firm of lawyers was guilty of "betraying and selling innocence in a court of justice," and with doing acts in their profession which should cause them "to be held up to the world as derelict in their sense of honor and obligation," and unworthy of "trust and confidence";⁷ that he had three times been suspended from practice for extortion;⁸ that he was guilty of "disgraceful conduct" in having at an election disclosed confidential communications made to him professionally;⁹ that he abandoned his client's cause by resigning his office in the midst of a litigation brought on

¹ *Archbold v. Sweet*, 1 Moody & R. 162; 5 Car. & P. 219.

² *Woodgate v. Ridout*, 4 Fost. & F. 202.

³ *Boydell v. Jones*, 4 Mees. & W. 446; 7 Dowl. 210; 1 Horn & H. 408; *R. v. Brown*, 11 Mod. 86; Holt, 425; *Sir Baptist Hicks's Case*, Hob. 215; Poph. 139.

⁴ *Clement v. Lewis*, 3 Brod. & B. 297.

⁵ *Gribble v. Pioneer Press Co.*, 34 Minn. 342.

⁶ *Wakley v. Healey*, 7 Com. B. 591.

⁷ *Ludwig v. Cramer*, 53 Wis. 193.

⁸ *Clarkson v. Lawson*, 3 Moore & P. 605; 4 Moore & P. 356; *Blake v. Stevens*, 4 Fost. & F. 232; 11 L. T. 543.

⁹ *Moore v. Terrell*, 4 Barn. & Adol. 870; 1 Nev. & M. 559.

by his advice, to the detriment of his client;¹ that he gave dishonest and unprofessional advice, made false statements in professional dealings, incurred loss of confidence by misconduct, embezzled moneys, and made false charges for services, and extorted excessive compensation;² that, acting for his client, he had acknowledged as sureties on a bond persons who, on investigation, were shown not to have known that their names were on the bond.³

ILLUSTRATIONS. — A libel complained of was headed, "How Lawyer B. treats his clients," followed by a report of a particular case in which one client of Lawyer B.'s had been badly treated. That particular case was proved to be correctly reported. *Held*, insufficient to justify the heading, which implied that Lawyer B. generally treated his clients badly: *Bishop v. Latimer*, 4 L. T., N. S., 775.

§ 1274. **Medical Men.** — It is libelous to publish of a medical man that certain quack medicines were prepared by him,⁴ or to charge him with causing the death of a patient by introducing scarlet fever into his system during vaccination,⁵ or that he allowed the decomposing body of a dead infant to remain several days in the same room with the sick mother.⁶ Where the publications, in stating the conduct of a physician in a particular case, only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge or skill in the same profession, they are not actionable. But where the words so employed in detailing the action of the physician in a particular case, taken together, are such as fairly impute to him gross ignorance and unskillfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physician into public

¹ *Hetherington v. Sterry*, 28 Kan. 426; 42 Am. Rep. 169.

² *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341.

³ *Henderson v. Commercial Advertiser Ass'n*, 46 Hun, 504.

⁴ *Clark v. Freeman*, 11 Beav. 112.

⁵ *Foster v. Scripps*, 39 Mich. 176.

⁶ *Pratt v. Press Co.*, 35 Minn. 251.

hatred, ridicule, or professional disrepute, and hence are actionable.¹ As where the words fairly impute to a physician a failure to discover the presence of diphtheria until long after it should have been discovered.² But it is no libel to say that he met homeopaths in consultation.³ A newspaper proprietor is not liable in damages for ludicrous, but innocent, misprints in an article ostentatiously puffing the writer and describing a surgical operation performed by him.⁴

§ 1275. Libels on Merchants and Traders.—Any written words are libelous which impeach the credit of any merchant or trader by imputing to him bankruptcy, insolvency, or even embarrassment, either past, present, or future, or which impute to him fraud or dishonesty, or any mean and dishonorable trickery in the conduct of his business, or which in any other method are prejudicial to him in the way of his employment.⁵ A publication is libelous which holds the plaintiff up to the public as wanting in the characteristics and qualities of a merchant of integrity and honor; although it appears that the publication related to the plaintiff's conduct in a transaction which was unlawful, if he acted in conformity to what he supposed to be the law and usage in similar cases.⁶ Thus it is libelous to say of a saloon-keeper that his license has been refused;⁷ or of a merchant, that he has gone into bankruptcy,⁸ or that he is in the hands of a sheriff,⁹ or that his "assets are about eighteen hundred dollars, . . . his indebtedness about the same. . . . We would advise

¹ *Gauvreau v. Superior Publishing Co.*, 62 Wis. 403.

² *Gauvreau v. Superior Publishing Co.*, 62 Wis. 403.

³ *Clay v. Roberts*, 9 Jur., N. S., 580.

⁴ *Sullings v. Shakespeare*, 46 Mich. 408; 41 Am. Rep. 166.

⁵ *Odgers on Libel and Slander*, 31. In a letter stating that the plaintiff has succeeded to the writer's business, the words, "A word to the wise is suf-

ficient," held capable of a libelous meaning: *Hays v. Mather*, 15 Ill. App. 30.

⁶ *Chenery v. Goodrich*, 98 Mass. 224.

⁷ *Bignell v. Buzard*, 3 Hurl. & N. 217.

⁸ *Shepherd v. Whitaker*, L. R. 10 Com. P. 502.

⁹ *Hermann v. Bradstreet Co.*, 19 Mo. App. 227.

a caution on your part in selling, and a prompt payment of matured indebtedness,"—if false;¹ or that he "seems to have coveted his late partner's cattle," and that he "started for the city with the cattle," and "an officer was put upon his trail";² or that a person regularly supplies bad and unwholesome water to ships, whereby the passengers are made ill;³ or that a druggist makes and sells counterfeit articles, and puts them up in counterfeit wrappers.⁴

It is not libelous *per se* to charge a grain-dealer with reducing the price of grain by entering into a combination;⁵ nor is a publication which recites of a firm that it unfairly procured a lease of certain premises, and then characterizes the transaction by epithets;⁶ nor that a dinner furnished by a caterer on a public occasion was "wretched," and was served "in such a way that even hungry barbarians might justly object," and that "the cigars were simply vile, and the wines not much better."⁷ The publication of an article by a manufacturer cautioning the public not to form an opinion of his manufacture from those advertised by a tradesman as of "first quality," since they were sold to him as "damaged," is not actionable as an imputation on the tradesman's character.⁸

ILLUSTRATIONS. — A railroad company sent notices to its agents instructing them to receive no freight for the plaintiff unless the charges were prepaid. This order was enforced against the plaintiff alone, and not against other shippers of freight. *Held*, that no cause of action was stated: *Allen v. R. R. Co.*, 100 N. C. 397. The defendant published of the plaintiff and his brother, who were a firm of wholesale liquor dealers, the following: "To the liquor dealers of Hartford: In order that you may be on your guard against the base treachery of a concern you may be doing business with, I desire to state a few facts

¹ *Newell v. How*, 31 Minn. 235.

² *Bain v. Myrick*, 88 Ind. 137.

³ *Solomon v. Lawson*, 8 Q. B. 823.

⁴ *Steketee v. Kimm*, 48 Mich. 322.

⁵ *Achorn v. Piper*, 66 Iowa, 694.

⁶ *Donaghue v. Gaffy*, 53 Conn. 43; 54 Conn. 257.

⁷ *Dooling v. Budget Publishing Co.*, 144 Mass. 258; 59 Am. Rep. 83.

⁸ *Boynton v. Shaw Stocking Co.*, 146 Mass. 219.

in regard to my experience with this firm. I refer to Donaghue Brothers, consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them, they went to the savings bank of which I rented my place, and offered ten dollars more a month than I was paying, and after getting their lease, served a notice on me to immediately vacate. The firm is not worthy of our support, being guilty of foul and unfair dealings to get square, as they say, with one who exercises the right to trade where he likes, and I sincerely believe they deserve that kind of warfare known as boycotting, and request those who believe in the fair thing, as between man and man, to give their support to some other house. For further particulars call on the undersigned. J. H. Gaffy." *Held*, not a libel *per se*, and that the plaintiff could not recover without proof of special damage: *Donaghue v. Gaffy*, 54 Conn. 257.

§ 1276. **When Libel on Thing a Libel on the Individual.**—An attack on a thing is a libel on the owner of it, or those responsible for or connected with it, when it at the same time indirectly attacks the individual.¹ Thus to impute that goods manufactured or sold by a person are adulterated to his knowledge is a charge of dishonesty and fraud in his trade, and is actionable;² and it has been held libelous to publish of a ship-captain that his ship is unseaworthy;³ that certain poems published by a bookseller are immoral or absurd;⁴ that certain songs sung by a professional singer are immoral;⁵ or that the plaintiff's bark-mills which he is selling infringes the defendant's patent.⁶ In an English case the plaintiffs were manufacturers of bags, and had manufactured a bag which they called the "Bag of Bags," and the defendant printed and published the following: "As we have not seen the 'Bag of Bags,' we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and

¹ Odgers on Libel and Slander, 32.

² Odgers on Libel and Slander, 32.

³ *Ingram v. Lawson*, 6 Bing. N. C. 212.

⁴ *Tabart v. Tipper*, 1 Camp. 350.

⁵ *Hart v. Wall*, L. R. 2 Com. P. Div. 146.

⁶ *Watson v. Trask*, 6 Ohio, 531; 27 Am. Dec. 271.

very vulgar; and which has been forced upon the notice of the public *ad nauseam*." Lush, J., held that the words could not be deemed libelous, either upon the plaintiffs or upon their mode of conducting their business. But Mellor and Hannen, JJ., thought that it was a question for the jury whether the words went beyond the limits of fair criticism, and whether or not they were intended to disparage the plaintiffs in the conduct of their business.¹

But for one trader merely to puff up his own goods, and decry those of his rival, is no libel, unless fraud or dishonesty be imputed.² And comments, however severe, on the advertisements or handbills of traders are not generally libelous.³

ILLUSTRATIONS.—Defendant published an advertisement in these words: "Whereas, there was an account in the Craftsman of John Harman, gunsmith, making guns of two feet six inches, to exceed any made by others of a foot longer (with whom, it is supposed, he is in fee), this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment (except out of a leather gun), as any gentleman may be satisfied of at the Cross Guns, in Longacre." Held, a libel on the plaintiff in the way of his trade: *Harman v. Delany*, 2 Strange, 898; 1 Barn. 289, 438. Plaintiff carried on the trade of an engineer, and sold in the way of his trade goods called "self-acting tallow-siphons or lubricators." Defendant published of the plaintiff in his said trade and as such inventor as follows: "This is to caution parties employing steam-power from a person offering what he calls self-acting tallow-siphons or lubricators, stating that he is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow [the defendant] takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam-engine, thereby constituting a saving of fifty per cent over every other kind yet offered

¹ *Jenner v. A'Beckett*, L. R. 7 Q. B. S. 264; *Western Counties Man. Co. v. Lawes Chem. Co.*, L. R. 9 Ex. 218.

² *Evans v. Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120; *Heriot v. Stuart*, 1 Esp. 437; *Young v. Macrae*, 3 Best & C. 759.

³ *Paris v. Levy*, 9 Com. B., N. S., 342; *Morrison v. Harmer*, 3 Bing. N. C. 759.

to the public. Those who have already adopted the lubricators against which R. H. would caution will find that the tallow is wasted, instead of being effectually employed, as professed." *Held*, no libel on the plaintiff, either generally or in the way of his trade, but only a libel on the lubricators, and therefore not actionable without proof of special damage: *Evans v. Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120. Plaintiff sued for a libel consisting of an article and a picture which showed his saloon to be the resort of degraded characters, etc. *Held*, that libel was on the place rather than on plaintiff, and an allegation of special damages was necessary: *Kennedy v. Press Pub. Co.*, 41 Hun, 422.

§ 1277. **Slander of Title.** — Where the plaintiff possesses an estate or interest in any real or personal property, an action lies against any one who maliciously and falsely denies or impugns the plaintiff's title thereto, if thereby damage follows to the plaintiff.¹ The statement must be both false and malicious. It is never actionable if it is true, nor if it is made in the *bona fide* assertion of the defendant's right, real or supposed, to the property.²

¹ *Pater v. Baker*, 3 Com. B. 869; *Like v. McKinstry*, 3 Abb. App. 62; *Andrew v. Deshler*, 45 N. J. L. 167; *Harriss v. Sneed*, 101 N. C. 273. False, defamatory, and malicious statements, made with intent to injure the owner of land and his title thereto, constitute slander of title: *Dodge v. Colby*, 108 N. Y. 445.

² *Walden v. Peters*, 2 Rob. (La.) 331; 38 Am. Dec. 213; *Carr v. Duckett*, 5 Hurl. & N. 783; *Smith v. Spooner*, 3 Tuant. 246; *Wren v. Weild*, L. R. 4 Q. B. 730; *McDaniel v. Baca*, 2 Cal. 326; 56 Am. Dec. 339; *Stark v. Chilwood*, 5 Kan. 141; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186. It seems to be clear that, in an action at common law, or now in the high court of justice, in the nature of slander of title, where the defendant has property of his own, in defense of which the supposed slander is uttered, it is not enough that the statement should be untrue, but there must be some evidence, either from the nature of the statement itself, or some allegation, or something from which the court, if it

is the court, or the jury, if it is the jury, may infer that the statement was not only untrue, but was made *mala fide* for the purpose of injuring the plaintiff, and not in the *bona fide* defense of the defendant's own property. It seems to be clear that, if a statement in such a proceeding as this is made in defense of the defendant's own property, although it injures and is untrue, it is still what the law calls a privileged statement; it is a statement that he has a right to make, unless, besides its untruth and besides its injury, what on the common-law side is called express malice is proved, — that is to say, want of *bona fides*, or the presence of *mala fides*: *Coleridge, C. J.*, in *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386. In an English case the plaintiff was the assignee of a beneficial lease, which he expected would realize one hundred pounds. But the defendant, the superior landlord, came to the sale, and stated publicly: "The whole of the covenants of this lease are broken, and I have served notice of ejectment; the premises will cost seventy pounds

Want of reasonable or probable cause is generally not sufficient from which to infer malice.¹ This is so where the defendant is the claimant himself or is an agent or attorney, and claims for his principal or client a title which he honestly believes him to possess;² so where a man *bona fide* asserts a title in his father or other near relative to whom he or his wife is heir apparent.³ But where the defendant makes no claim at all for himself or any connection of his, but asserts a title in some one who is a stranger to him, here he clearly is meddling in a matter which is no concern of his, and such officious and unnecessary interference will be deemed malicious.⁴ A levy of execution against one person upon lands belonging to another, and without going upon the land, creates no lien upon it, and is not an actionable wrong, where there is no malice; and if not alleged to be malicious, it will not sustain an action for slander of title.⁵ The fact that the licensee of a copyrighted design had, before obtaining the license, infringed the copyright, does not make a notice sent by him to other infringers, on advice of counsel, warning them to desist, give up the infringing articles in their hands, and account for those disposed of, a slander of title, though it would be a good defense to

to put them in repair." In consequence of this statement the property fetched only thirty-five guineas. Rolfe, B., left to the jury only one question, Was the defendant's statement true or false? and they found a verdict for the plaintiff; damages, forty pounds. But the court of exchequer granted a new trial, on the ground that two other questions ought to have been left to the jury as well: Was the statement, or any part of it, made maliciously? and did the special damage arise from such malicious statement, or from such part of it as was malicious? *Brook v. Rawl*, 4 Ex. 521; 19 L. J. Ex. 114.

¹ *Pitt v. Donovan*, 1 Maule & S. 648; *Steward v. Young*, L. R. 5 Com. P. 122; 22 L. T. 168; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237; *Pater v. Baker*,

3 Com. B. 831. To constitute slander of title, there must have been malice. It is not malicious to allege a want of title in the owner: *Dodge v. Colby*, 37 Hun, 515. The defendant is entitled to a nonsuit if the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties: *Thompson v. White*, 70 Cal. 135.

² *Hargrave v. Le Breton*, 4 Burr. 2422; *Steward v. Young*, L. R. 5 Com. P. 122.

³ *Pitt v. Donovan*, 1 Maule & S. 639; *Gutsole v. Mathers*, 1 Mees. & W. 495.

⁴ *Odgers on Libel and Slander*, 143; and see *Atkins v. Perrin*, 3 Fost. & F. 179.

⁵ *Walkley v. Phillips*, 49 Mich. 374.

an action for infringement.¹ So where two persons claim patents on a certain machine, it is not actionable for one of them to warn the public or the customers of the other against using the machine of the latter, because it is an infringement, unless the plaintiff can prove that the defendant's claim was not a *bona fide* one, even though unfounded, but was a malicious attempt to injure him, knowing he had no rights.² But it has been held that a patentee is not entitled to publish statements that he intends to institute legal proceedings in order to deter persons from purchasing alleged infringements of his patent, unless he does honestly intend to follow up such threats by really taking such proceedings.³

And special damage must be proved to have resulted from the defendant's words, and to be such as would naturally or reasonably arise therefrom.⁴ Special damage is shown by proof that the plaintiff was thereby prevented from selling his property, or renting or leasing it.⁵ But a mere apprehension of damage, or that his property (not

¹ *Hastings v. Giles Lithographic Co.*, N. Y. Sup. Ct., 1889.

² *Wren v. Weild*, L. R. 4 Q. B. 730. Slander of title may be predicated of letters patent; and an action for such slander or libellies, although defendant has repeated merely what he has heard: *Meyrose v. Adams*, 12 Mo. App. 329. "Here is a patent; here is a defendant in possession of a patent; and here is a defendant saying, for all that appears, perfectly *bona fide* to the plaintiff, and to the persons who are going to deal with the plaintiff: 'Remember, what the plaintiff is making is an infringement of my patent, and is an injury to my property; and I tell you, that if you proceed to injure my property, I shall take proceedings against you.' The result of that may be an injury to the plaintiff. Possibly, in this case, it has been an injury to the plaintiff. I am quite content to assume that it has been; but it seems, and there appears to be good ground for it, that a statement untrue and injurious, made under such

circumstances, does not give a good ground of action. There must be, besides, the element of *mala fides*, and a distinct intention to injure the plaintiff, apart from the honest defense of the man's own property": Lord Coleridge, C. J., in *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 386.

³ *Rollins v. Hinks*, L. R. 13 Eq. 355; 41 L. J. Ch. 358; *Axmann v. Lund*, L. R. 18 Eq. 330; *Halsey v. Brotherhood*, L. R. 15 Ch. Div. 514.

⁴ *Haddon v. Lott*, 15 Com. B. 411; *Halsey v. Brotherhood*, L. B. 15 Ch. Div. 411; *Kendall v. Stone*, 5 N. Y. 14; *Like v. McKinstry*, 41 Barb. 186.

⁵ *Odgers on Libel and Slander*, 138; *Collins v. Whitehead*, 34 Fed. Rep. 121. Where one under contract for the purchase of property is induced to refuse to complete the purchase by reason of slanderous words uttered concerning the property by a third person, the vendor cannot sue such person for slander. His remedy is on the contract of sale: *Brentman v. Note*, N. Y. Sup. Ct., 1889.

in the market) would be discredited, is not sufficient.¹ Exemplary damages are not to be awarded, unless there be proof of a wanton and malicious attempt to injure the owner. This was held in an action brought by one whose father-in-law, in consideration of a life support, had conveyed the land to him, against a brother-in-law, for saying to one who was negotiating a purchase thereof, that if he consummated the purchase, he would buy a lawsuit, etc.² To maintain an action for slander of title, it is necessary for plaintiff to show either a title or an interest in the property.³ The defendant, by setting up title in himself to the property, stands in the position of a plaintiff in a petitory action, and must make out his case.⁴ If the defendant admits the slander, and avers a better title in himself, the court may investigate his title in the same action, with the *onus* on himself, to succeed entirely on the strength of his own title.⁵ The object of an action for slander of title is to quiet titles, and if this object is attained by a waiver of title upon the part of defendant, there can be no recovery of damages against him, where there has been no malice upon his part.⁶ Fraud in obtaining a receipt of a sum, as specified in a deed, is a defense to an action for slander of title, against the grantor of land who published a caution against persons purchasing from his grantee, claiming that the title was obtained under fraudulent pretenses.⁷ An action for verbal slander of title to land cannot be maintained against two persons jointly.⁸

ILLUSTRATIONS. — Lands were settled on D. in tail, remainder to the plaintiff in fee. D. being an old man and childless, plaintiff was about to sell his remainder to A., when the de-

¹ Odgers on Libel and Slander, 139; Manning v. Avery, 3 Keb. 153; Malachy v. Soper, 3 Bing. N. C. 383.

² Van Tuyl v. Riner, 3 Ill. App. 556.

³ Edwards v. Burris, 60 Cal. 157.

⁴ Clarkston v. Vincent, 32 La. Ann. 613; Gay v. Ellis, 33 La. Ann. 249; Sully v. Spearing, 40 La. Ann. 558.

⁵ Dalton v. Wickliffe, 35 La. Ann. 355.

⁶ Walden v. Peters, 2 Rob. (La.) 331; 38 Am. Dec. 213.

⁷ McDaniel v. Baca, 2 Cal. 326; 56 Am. Dec. 339.

⁸ Webb v. Cecil, 9 B. Mon. 198; 48 Am. Dec. 423.

defendant interfered and asserted that D. had issue. A. consequently refused to buy. *Held*, that the action lay: *Bliss v. Stafford*, Owen, 37; Moore, 188. The plaintiff's father being tenant in tail of certain lands, which he was about to sell, the purchaser offered the plaintiff a sum of money to join in the assurance so as to estop him from attempting to set aside the deed, should he ever succeed to the estate-tail; but the defendant told the purchaser that the plaintiff was a bastard, wherefore he refused to give the plaintiff anything for his signature. *Held*, that the plaintiff had a cause of action, though he was the youngest son of his father, and his chance of succeeding therefore remote: *Vaughan v. Ellis*, Cro. Jac. 213. The defendant falsely represented to the bailiff of a manor that a sheep of the plaintiff was an estray, in consequence of which it was wrongfully seized. *Held*, that an action lay against him: *Newman v. Zachary*, Aleyn, 3. Plaintiff had purchased the manor and castle of H. in fee from A., and was about to demise them to R. for a term of twenty-two years, when the defendant, a widow, said: "I have a lease of the castle and manor of H. for ninety years"; and she showed him what purported to be a lease from a former A. to her husband for a term of ninety years. This lease was a forgery; but the defendant was not aware of it. *Held*, that no action lay for slander of title; for the defendant had claimed a right to the property herself. *Aliter*, had she known the lease was a forgery: *Gerard v. Dickenson*, 4 Rep. 18; Cro. Eliz. 197. A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having whilst so in possession conveyed all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently, the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. In an action for slander of title the plaintiff was nonsuited. On appeal, *held*, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited: *Steward v. Young*, L. R. 5 Com. P. 122. D. published in the notice of defect of A.'s title to an oleomargarine patent that "a final injunction and decree was obtained against A. in the United States circuit court," whereas, in fact, there had been only an *ex parte* order for a preliminary injunction, and the suit was discontinued

by consent of the parties. *Held*, in an action for slander of title, that such allegation was in excess of the occasion, and not merely an assertion of a supposed right, and must be presumed malicious: *Andrew v. Deshler*, 45 N. J. L. 167. A written contract had been entered into, before the words were spoken, for the sale of the land in question, and the purchaser, having heard thereof, became in consequence dissatisfied with his bargain, and the plaintiff, at his request, canceled it. *Held*, that the action could not be maintained, the pecuniary damage being the result of his own act: *Kendall v. Stone*, 5 N. Y. 14. Plaintiff offered his land for sale at auction, defendant was present, and forbade the sale, declaring that plaintiff had only a dower interest in the land, and that the title was in himself; in so declaring, defendant was acting under advice of counsel, but such evidence was procured by false representations made to his counsel by defendant. *Held*, proper for the court to submit the question of the latter's malice or *bona fides* to the jury: *Gent v. Lynch*, 23 Md. 58; 87 Am. Dec. 559. Defendant, a book publisher, issued a circular, charging that plaintiff, by certain publications, infringed defendant's copyright. Plaintiff sued to recover damages sustained by the publication of the circular. *Held*, that the suit was in the nature of an action for slander of title, and that actual malice must be shown to justify a recovery: *John W. Lovell Co. v. Houghton*, 54 N. Y. Sup. Ct. 60. A receiver appointed in a partition suit leased the land for a term of years. Afterwards, the court abridged the lease, so as to end it shortly after the time set for partition sale. After the sale, this order was affirmed on appeal. At the sale the lessees, who were then in possession, read a notice claiming the land for the full period of their lease. *Held*, that such notice, being the lessees' only means of protecting their claims against an innocent purchaser, was not slander of title: *Cornwell v. Parke*, N. Y. Sup. Ct., 1889.

§ 1278. **Slander of Goods.** — An untrue statement disparaging a man's goods or property, published without a lawful occasion, and causing him special damage, is actionable.¹ But it is not actionable for a man to commend

¹ *West. etc. Manure Co. v. Lawes Chem. Manure Co.*, L. R. 9 Ex. 218; *Watson v. Trask*, 6 Ohio, 531; 27 Am. Dec. 271; *Wilson v. Dubois*, 35 Minn. 471; 59 Am. Rep. 335; *Weir v. Allen*, 51 N. H. 171. In *Addison on Torts*, 184, it is said: "Disparaging criticisms by one tradesman upon the goods of a rival tradesman are not actionable, unless it is proved that they have been maliciously and fraudulently made, and were false to the knowledge of the party at the time they were made." But Mr. Odgers (*Libel and Slander*, 147), after a review of all the English cases, holds that the defendant's knowledge of the falsity of his statements at the time he made them

his own goods, or to advertise that he can make as good articles as any other person in the trade.¹ No action lies for representing the plaintiff's ferry not to be as good as another rival ferry, and inducing and persuading travelers to cross at the other, and not at the plaintiff's, ferry.²

ILLUSTRATIONS.—A mineral-oil merchant published a chemist's report, which reflected unfavorably upon the oil sold by a rival merchant. *Held*, that the action would not lie, provided the report was the result of a *bona fide* analysis of the oils, and contained nothing known to the defendant as false at the time of publication: *Young v. Macrae*, 3 Best & S. 264. The defendants falsely and without lawful occasion published a detailed analysis of the plaintiffs' artificial manure and of their own, in which the plaintiffs' manure was much disparaged and their own extolled. Special damage resulted. *Held*, that the action lay: *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218. The defendant published an advertisement, denying that the plaintiff held any patent for the manufacture of "self-acting tallow-siphons or lubricators," and cautioning the public against such lubricators as wasting the tallow. No special damage was alleged. *Held*, that the words were not a libel on the plaintiff, either generally or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage: *Evans v. Harlow*, 5 Q. B. 624; 13 L. J. Q. B. 120. H. was prevented from making an advantageous sale of lands belonging to him, and containing an iron-ore mine, by the misrepresentations of P. to the proposed buyer, to the effect that an experienced iron manufacturer was of the opinion that the iron mine was but a "pocket," or nest, that would suddenly run out. *Held*, that H. could recover damages from P. in a suit in the nature of an

is immaterial except on the question of damages; quoting Cockburn, C. J., in *Young v. Macrae*, 3 Best & S. 267, where he said: "I am far from saying that if a man falsely and maliciously makes a statement disparaging an article which another manufactures or vend, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is averred, an action might not be maintained. For although none of us are familiar with such actions, still we can see that a most grievous wrong might be done in that way, and it ought not to be without remedy." "If a man makes a

false statement with respect to the goods of A, in comparing his own goods with those of A, and A suffers special damage, will not an action lie?" Per Cockburn, C. J., in *Young v. Macrae*, 32 L. J. Q. B. 8. "If a man were to write falsely that what another man sold as Turkish rhubarb was three parts brick-dust, and special damage could be proved, it might be actionable": *Id.* See *Hovey v. Leather Tip Pencil Co.*, 57 N. Y. 119; 15 Am. Rep. 470.

¹ *Harman v. Delany*, 2 Strange, 898; 1 Barn. 289.

² *Johnson v. Hitchcock*, 15 Johns. 185.

action of slander for defamation of title: *Paull v. Halferty*, 63 Pa. St. 46; 3 Am. Rep. 518. A notice in a newspaper advised applicants for board at a specified street and number to "inform themselves, before locating there, as to table, attention, and characteristics of the proprietors." *Held*, not libelous *per se*: *Wallace v. Bennett*, 1 Abb. N. C. 478. "Caution.—The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent, J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent, J. S." *Held*, no libel upon a dealer in coal in L. who has advertised genuine Franklin coal for sale: *Boynton v. Remington*, 3 Allen, 397. The plaintiff alleged that he was and had been engaged in compiling and publishing biennial and county directories at great labor and expense, and had acquired a large advertising patronage therefor and a large list of subscribers; that he had prepared to and would have published the same in 1885, but that by reason of the false and fraudulent statement of the defendant that he had gone out of the business, and disparaging his business, he had been prevented from doing so, and the defendant had published such a directory to his injury; but he did not allege that he had been deprived of the benefit of any contract or property, or that the defendant published the directory as the plaintiff's, nor any infringement of copyright. *Held*, no cause of action: *Dudley v. Briggs*, 141 Mass. 582; 55 Am. Rep. 494.

§ 1279. **Other Cases.**—Other cases in which words spoken caused special damage to another, and an action was held to lay, although the reputation of the plaintiff was not affected at all, are to be found in the reports.¹ If a man, it is said in *Conesby's Case*,² should menace my tenants at will, *per quod* they depart from their tenures, an action upon the case will lie against him, but the menace without their departure is no cause of action. So if a person threatens the plaintiff's workmen, so that they do not dare to go on with their work, whereby the plaintiff loses the selling of his goods, an action lies.³ In an

¹ See Title Torts — Damnum Absque Injuria. Rolle Abr. 108; *Tarleton v. McGawley*, Peake, 270; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Skinner v.*

² Year Book, 9 Hen. VII., p. 7.

³ *Garret v. Taylor*, Cro. Jac. 567; 1 Kitch, L. R. 2 Q. B. 393.

English case, the defendant wrongfully and maliciously caused certain persons who had agreed to sell goods to the plaintiff to refuse to deliver them, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien. The court held that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act.¹

¹ *Green v. Button*, 2 Crompt. M. & R. 707.

CHAPTER LXVII.

DEFENSES.

- § 1280. Justification — Truth when a defense.
- § 1281. Privileged communications — Absolute and qualified privilege.
- § 1282. Absolute privilege — Executive of nation and state.
- § 1283. Members of legislative bodies.
- § 1284. Witnesses in judicial proceedings.
- § 1285. Judges.
- § 1286. Jurors.
- § 1287. Pleadings and papers in cause.
- § 1288. Counsel and attorneys.
- § 1289. Military courts.
- § 1290. Qualified privilege — Duty to society.
- § 1291. As to character of servants.
- § 1292. Answers to confidential inquiries.
- § 1293. Information volunteered.
- § 1294. Confidential relations.
- § 1295. Statements to officers of the law and public authorities.
- § 1296. Common interest.
- § 1297. Self-defense.
- § 1298. Reports of judicial proceedings.
- § 1299. Legislative proceedings.
- § 1300. Other reports — No privilege.
- § 1301. Malice — Proof of.

§ 1280. **Justification — Truth when a Defense.** — The falsehood of defamatory words is presumed, and the *onus* is on the defendant to prove their truth.¹ But if he can do so, the truth of the statement is a complete defense to either an oral or a written or printed slander, and this, even though the words were published spitefully and maliciously.² Where the charge imputes to the plaintiff the

¹ *Hinchman v. Lawson*, 5 Leigh, 695; 27 Am. Dec. 623; *Offutt v. Earlywine*, 4 Blackf. 460; 32 Am. Dec. 40.

² *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Castle v. Houston*, 19 Kan. 417; 27 Am. Rep. 127; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *McBee v. Fulton*, 47 Md. 403; 28 Am. Rep. 465; *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 97; *Foss v.*

Hildreth, 10 Allen, 76; *Perry v. Porter*, 124 Mass. 338; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102. A plea of justification reaffirms the charge or charges justified, and avers the truth of the words spoken. If the words impute a crime punishable by law, and are not in the nature of privileged communications, the filing of a plea may be attended with one of three

commission of a crime, the truth of the charge (according to the weight of authority) need not be proved beyond a reasonable doubt, as the plaintiff's guilt in a criminal trial would have to be proved, but it is sufficient to prove it by a preponderance of the evidence as in other civil issues.¹ This defense must be specially pleaded; it is not admissible in bar under the general issue.²

The justification must be as broad as the charge.³ A general charge cannot be justified by proving a single instance;⁴ a charge of misconduct of a specific kind is

results: 1. If wholly unwarranted, the jury may treat it as an aggravation; 2. If proved true, it defeats the action; 3. If not proved true, the evidence given under it may mitigate the damages: *Henderson v. Fox*, Ga., 1889. The Massachusetts statute that the truth of a libel shall be deemed a sufficient justification, "unless malicious intention shall be proved," applies to civil actions as well as to criminal prosecutions: *Perry v. Porter*, 124 Mass. 338.

¹ *Ellis v. Buzzell*, 60 Me. 209; 11 Am. Rep. 204; *Matthews v. Huntley*, 9 N. H. 146; *Kincade v. Bradshaw*, 3 Hawks, 63; *Sloan v. Gilbert*, 12 Bush, 51; 23 Am. Rep. 708; *McBee v. Fulton*, 47 Md. 403; 28 Am. Rep. 465; *Bell v. McGinness*, 40 Ohio St. 204; 48 Am. Rep. 673; *Barfield v. Britt*, 2 Jones, 41; 62 Am. Dec. 190; *Kidd v. Fleek*, 47 Wis. 443; *Riley v. Norton*, 65 Iowa, 306; *Tunnell v. Ferguson*, 17 Ill. App. 76; *Scott v. Fleming*, 17 Ill. App. 561; *Edwards v. Knapp*, 97 Mo. 432. *Contra*, *Fountain v. West*, 23 Iowa, 9; 92 Am. Dec. 406; *Ellis v. Lindley*, 38 Iowa, 461; *Tucker v. Call*, 45 Ind. 31; *Newbit v. Statuck*, 35 Me. 315; 58 Am. Dec. 706; *Merk v. Gelzhauser*, 50 Cal. 631; *Corbley v. Wilson*, 71 Ill. 209; 22 Am. Rep. 98; *Williams v. Gunnels*, 66 Ga. 521; *Burckhalter v. Coward*, 16 S. C. 435; *Byrket v. Monohon*, 7 Blackf. 83; 41 Am. Dec. 212.

² *Porter v. Botkins*, 59 Pa. St. 484; *Thomas v. Dunaway*, 30 Ill. 373; *Van Ankin v. Westfall*, 14 Johns. 233; *Wormouth v. Cramer*, 3 Wend. 395; 20 Am. Dec. 706; *Beardsley v. Bridgman*, 17 Iowa, 290; *Thompson v. Bow-*

ers, 1 Doug. (Mich.) 321; *Huson v. Dale*, 19 Mich. 17; 2 Am. Rep. 66; *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Kelley v. Dillon*, 5 Ind. 426; *Knight v. Foster*, 39 N. H. 576; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *Bourland v. Eidson*, 8 Gratt. 27; *Scott v. McKinish*, 15 Ala. 662; *Hutchinson v. Wheeler*, 35 Vt. 330; *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271; *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757; *Padgett v. Sweeting*, 65 Md. 404; *Duval v. Davey*, 32 Ohio St. 604. *Aliter* where it is agreed that the plaintiff may introduce such evidence under the plea of not guilty: *Woddrop v. Thacher*, 117 Pa. St. 340. But it may be introduced to rebut malice, and in mitigation of damages: *Huson v. Dale*, 19 Mich. 17; 2 Am. Rep. 66; *Remington v. Congdon*, 2 Pick. 310; 13 Am. Dec. 431. A plea of justification should specify the crime with certainty: *Nall v. Hill*, Peck, 325; *Andrews v. Vanduzer*, 11 Johns. 38; *Billings v. Waller*, 28 How. Pr. 97. On such a plea the defendant is entitled to the opening and closing of the case: *Stith v. Fullermeder*, 40 Kan. 73.

³ *Burford v. Wible*, 32 Pa. St. 95; *Carpenter v. Bailey*, 56 N. H. 283; *Stillwell v. Barter*, 19 Wend. 487; *State v. Burnham*, 9 N. H. 34; 31 Am. Dec. 217; *Whittemore v. Weiss*, 33 Mich. 348; *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757; *Jones v. Townsend*, 21 Fla. 431; 58 Am. Rep. 676; *Hathorn v. Congress Spring Co.*, 44 Hun, 608.

⁴ *Burford v. Wible*, 32 Pa. St. 95. In an action of slander for calling the

not justified by proving the plaintiff guilty of misconduct of a similar character.¹ It is libelous to publish a highly colored account of judicial proceedings, mixed with the reporter's own observations and conclusions upon what passed in court, containing an insinuation that the plaintiff had committed perjury; and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter altogether unjustified.² It is no justification of a charge that the plaintiff is a pettifogger and without character, that he was guilty of misconduct in a single instance;³ or of a charge that the plaintiff stole hogs, that he stole a hog;⁴ or of a charge that he stole a horse, that he stole a hog;⁵ or of a charge that the plaintiff had been three times disbarred from practice, that he had once been so suspended;⁶ or of a charge that "she had gone nine miles from home one night to four different colliers' shanties, and had gone to bed to them," that on one occasion she had committed fornication with one collier, but not at the shanties;⁷ or of a charge that the plaintiff was guilty of sodomy with a man, that he was guilty of sodomy with a cow;⁸ or of a charge that a man had criminal intercourse with A, that he had criminal intercourse with B;⁹ or of a charge that one swore falsely before the register of the land-office, that he made a false oath before a notary

plaintiff a whore, evidence that the plaintiff committed acts of prostitution two months after the words were spoken is inadmissible; *Beggarly v. Craft*, 31 Ga. 309; 76 Am. Dec. 687.

¹ *Howard v. Thompson*, 1 Am. Lead. Cas. 178; *Skinner v. Powers*, 1 Wend. 451; *Sharp v. Stephenson*, 12 Ired. 348. Where words complained of as libelous allege a habit of committing a certain kind of unlawful or flagitious act, as well as a specific instance of the same, defendant may plead in defense or mitigation other specific instances

of the same kind of act of which the plaintiff has been guilty: *Kimball v. Fernandez*, 41 Wis. 329.

² *Stile v. Nokes*, 7 East, 493; *Carr v. Jones*, 3 Smith, 491.

³ *Fitch v. Lemmon*, 27 U. C. Q. B. 73.

⁴ *Swan v. Rary*, 3 Blackf. 298.

⁵ *Dillard v. Collins*, 25 Gratt. 343.

⁶ *Clarkson v. Lawson*, 6 Bing. 266.

⁷ *Burford v. Wible*, 32 Pa. St. 95.

⁸ *Downs v. Hawley*, 112 Mass. 237.

⁹ *Walters v. Smoot*, 11 Ired. 315; *Sharp v. Stephenson*, 12 Ired. 348.

public;¹ or of a charge that he was a "felon editor," that he had been convicted of felony and sentenced to twelve months' imprisonment;² or of a charge that a justice of the peace stole whisky fines, that he did not pay over a fine for an assault;³ or of a charge that a woman was a "whore," that she had sexual intercourse with her affianced husband before marriage;⁴ or of a charge that plaintiff was a "land shark," that plaintiff had the reputation of purchasing lands at tax sales, and had purchased largely at such sales;⁵ or of a charge that a county commissioner had been corruptly influenced by pecuniary considerations, and had willfully acted and voted as commissioner when his private interests were involved, that a public road across plaintiff's land was a public necessity, that plaintiff had closed up a road which he had formerly permitted the public to use, that the commissioners had opened a road over the land, and the viewers had assessed plaintiff's damages at fifty dollars, but that plaintiff asserted a claim before the commissioners for ten thousand dollars, and threatened that if it was not approved he would enforce its payment through the courts;⁶ or of a charge that he was a "libelous journalist," that he had libeled one man who had recovered damages against him;⁷ of a charge "that no boys had for the last seven years received instruction in the Free Grammar School at Lichfield," of which plaintiff was head master, and that the decay of the school seemed mainly attributable to the plaintiff's violent conduct, that no boys had in fact received instruction in the

¹ Phillips v. Beene, 16 Ala. 720.

² Leyman v. Latimer, L. R. 3 Ex. Div. 15, 352.

³ Bailey v. Kal. Pub. Co., 40 Mich. 251.

⁴ Sheehey v. Cokley, 43 Iowa, 183; 22 Am. Rep. 236.

⁵ Stewart v. Minnesota Tribune Co., Minn., 1889.

⁶ Cotulla v. Kerr, Tex., 1889. In

such case the justification must be confined to the fact that plaintiff, as a county commissioner, did sit in judgment in a matter wherein he had a pecuniary interest, and did willfully act and decide in favor of his personal interest, instead of in accordance with his duty to the public: Cotulla v. Kerr, Tex., 1889.

⁷ Wakley v. Cooke, 4 Ex. 511.

school for the last seven years, and that the plaintiff had been guilty of violent conduct towards several of his scholars;¹ or of a charge that the plaintiff had "bolted," leaving some of the tradesmen of the town to lament the fashionable character of his entertainment, that he had quitted the town leaving some of his bills unpaid;² or of a charge that the plaintiff having challenged his opponent to a duel, spent the whole of the night preceding in practicing with his pistol, and killed his opponent, and was therefore guilty of murder, that the plaintiff had killed his opponent, and had been tried for murder;³ or of a charge that the plaintiff stole the defendant's shingles, that the defendant had sold the plaintiff's shingles without his authority, and afterwards denied that he knew anything respecting them;⁴ or of a charge that he had stolen "a pot and waiter," that the plaintiff stole "a waistcoat pattern";⁵ or of a charge of packing a jury, that the plaintiff did not interfere at all in the selection of a jury impaneled and sworn, but only conducted improperly the selection of the freeholders to be placed in the jury-box;⁶ or of a charge of being "a whore," that the plaintiff is a "reputed thief," or that the plaintiff was reported by her own sister to be a whore;⁷ or of a charge imputing want of chastity to the wife, that husband and wife lived unhappily together;⁸ or of a charge that the plaintiff forged a bill for two hundred and fifty dollars, that he forged one for eighty dollars;⁹ or of a charge that plaintiff stole defendant's corn, that the plaintiff planted corn on the defendant's land on shares, the crop to be divided equally in the ear, that the plaintiff fraudulently secreted and carried away, with intent to convert the same to his own use, a considerable quantity of said corn,

¹ *Smith v. Parker*, 13 Mees. & W. 459.

² *O'Brien v. Bryant*, 16 Mees. & W. 168.

³ *Helsham v. Blackwood*, 11 Com. B. 128.

⁴ *Shepard v. Merrill*, 13 Johns. 475.

⁵ *Eastland v. Caldwell*, 2 Bibb, 21.

⁶ *Mix v. Woodward*, 12 Conn. 262.

⁷ *Smith v. Buckecker*, 4 Rawle, 295.

⁸ *Anonymous*, 1 Hill (S. C.), 251.

⁹ *Stiles v. Comstock*, 9 How. Fr. 48.

without the knowledge of the defendant;¹ or of the charge that the plaintiff stole a dollar from A, that the plaintiff had stolen a dollar from B;² or of a charge that "the scoundrel was indicted at, etc., for fraud," that the plaintiff had been indicted and arrested for a conspiracy to cheat and defraud;³ or of a charge that plaintiff, her uncle's housekeeper, was guilty of larceny, that she openly gave some partly worn clothing in charity;⁴ or of a charge that plaintiff (a dramatic author) appropriated a play called "Flirtation," that plaintiff had appropriated a play called "Mock Marriage";⁵ or of a charge that a counselor at law offered himself as a witness in order to divulge the secrets of his client, that he disclosed matter communicated to him by his client which had no relation or pertinency to the cause in which he was engaged;⁶ or of a charge of theft against the plaintiff, that the defendant had just ground for believing the plaintiff to be a very dishonest man.⁷

Where the libel consists of one specific charge, and this is proved true, the defendant is not required to justify every expression which he has used in referring to that charge.⁸ So if it is substantially proved, a mere inaccuracy in the details which could not have altered the opinion of the hearers, or made any different impression on them than the real truth would have done, will not render the defendant liable.⁹

¹ *Bisbey v. Shaw*, 15 Barb. 578.

² *Self v. Gardner*, 15 Mo. 480.

³ *Loveland v. Hosmer*, 8 How. Pr. 215.

⁴ *Mielenz v. Quasdorf*, 68 Iowa, 726.

⁵ *Daly v. Byrne*, 1 Abb. N. C. 150.

⁶ *Riggs v. Denniston*, 3 Johns. Cas. 198; 2 Am. Dec. 145.

⁷ *Woodruff v. Richardson*, 20 Conn. 238.

⁸ *Odgers on Libel and Slander*, 170.

⁹ *Odgers on Libel and Slander*, 170.

"If epithets or terms of general abuse be used which do not add to the sting of the charge, they need not be justified: *Edwards v. Bell*, 1 Bing. 403;

Morrison v. Harmer, 3 Bing. N. C. 767; but if they insinuate some further charge in addition to the main imputation, or imply some circumstance substantially aggravating such main imputation, then they must be justified as well as the rest: *Helsham v. Blackwood*, 11 Com. B. 129. In such a case it will be a question for the jury whether the substance of the libelous statement has been proved true to their satisfaction, or whether the fact not justified amounts to a separate charge or imputation against the plaintiff, substantially distinct from the main charge or gist of the

So it has been held that a libel which professed to expose the "homicidal tricks of these impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill," and asserted that "several of the rotgut rascals had been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterized the plaintiffs' system as "one of wholesale poisoning," was justified by proof "that the plaintiffs' pills when taken in large doses, as recommended by the plaintiffs, were highly dangerous, deadly, and poisonous," and "that two persons had died in consequence of taking large quantities of them; and that the people who had administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons," although the expressions "scamps," "rascals," and "wholesale poisoning" had not been fully substantiated, the main charge and gist of the libel being amply sustained;¹ that a libel published by a railroad company, to the effect that the plaintiff had been convicted of riding in a train for which his ticket was not available, and was sentenced to be fined one pound, or to three weeks' imprisonment in default of payment, was justified by proof that he had been so convicted and fined one pound, and sentenced to a fortnight's imprisonment in default of payment, as the error could not have made any difference in the effect which the notice would produce on the mind of the public;² that a statement that plaintiff is under indictment for malversation in office as justice of the peace is justified by proof of a prosecution before a justice for not paying over an assault-and-battery fine collected by him as justice;³ a statement that a person is a

libel, or at least amounts to a material aggravation of such main charge: *Warman v. Hine*, 1 Jur. 820; *Weaver v. Lloyd*, 2 Barn. & C. 678; *Behrens v. Allen*, 3 Fost. & F. 135; *Odgers on Libel and Slander*, 171.

¹ *Morrison v. Harmer*, 3 Bing. N. C. 767; 4 Scott, 533.

² *Alexander v. R. R. Co.*, 34 L. J. Q. B. 152; 6 Best & S. 340.

³ *Bailey v. Publishing Co.*, 40 Mich. 251.

person of bad moral character, and unfit to have charge of a school, is justified by showing that he is habitually profane and a sabbath-breaker;¹ a justification that plaintiff had had sexual intercourse with her brother is sufficient to cover a charge that she had had such intercourse, and was pregnant thereby;² a statement that a person has been convicted of conspiracy is justified by proving such conviction, though the plaintiff afterwards secured a new trial and the case against him was dismissed.³

A publication which says that "from circumstantial evidence" defendant "had good reason to believe, and did believe," plaintiff to be guilty of a certain crime cannot be justified by proving that defendants did so believe, or had good reason to so believe. The defendant must prove that plaintiff was actually guilty of the offense.⁴ So where the libel was that "the chief owners [of a mine] believe they have been outrageously swindled," and on the trial the defendant offered in justification to call the chief owners of the mine to prove that they did believe that they had been thus swindled, it was held that the evidence was properly excluded. In order to justify the publication, the defendant should have proved that the owners of the mine had, in fact, been swindled.⁵

But though a partial justification is no defense, it is relevant, and may be shown in mitigation of damages.⁶ So the defendant may justify as to one part, and demur or plead privilege to the rest, or deny that he ever spoke or published the rest of the words. But in all these cases the part selected must be severable from the rest so as to be intelligible by itself, and must also convey a dis-

¹ *Wieman v. Mabec*, 45 Mich. 484; 40 Am. Rep. 477.

² *Edwards v. Knapp*, 97 Mo. 432.

³ *Boogher v. Knapp*, 97 Mo. 122.

⁴ *Fountain v. West*, 23 Iowa, 9; 92 Am. Dec. 406.

⁵ *Wilson v. Fitch*, 41 Cal. 363.

⁶ *Burford v. Wible*, 32 Pa. St. 95; *Moore v. Mauk*, 3 Ill. App. 114.

inct and separate imputation against the plaintiff.¹ But though a plea that the libelous publication is true constitutes a complete defense if proved, it is a deliberate reassertion of the original charge, and estops the defendant from showing that it was published under a mistake.² Evidence in mitigation of damages that it was the general opinion that the facts charged were true is not admissible, unless the defendant knew such to be the general opinion, and relied on that in making the charge.³

It is no defense to an action of slander that the defendant was intoxicated at the time of speaking the slanderous words.⁴

ILLUSTRATIONS.—The complaint alleged that the defendant accused the plaintiff of being a thief. The answer admitted the speaking of the words, but denied malice, and averred that he believed the charge to be true, and averred that the defendant had bought a farm of the plaintiff, and that the plaintiff afterwards unlawfully entered thereon and converted certain fixtures "and other things belonging to the defendant, by reason of the purchase aforesaid," to his own use. *Held*, not a defense: *Trimble v. Foster*, 87 Mo. 49; 56 Am. Rep. 440. The defendant imputed to the plaintiff, who was a clergyman, these words: "Mr. S. said the blood of Christ has nothing to do with our salvation more than the blood of a hog." *Held*, that testimony tending to prove that the plaintiff denied the divinity of Christ and the doctrine of his atonement, and said he was a created being, a good man and perfect, his death that of a martyr, but that there was no more virtue in his blood than that of any other creature, was not admissible, either in justification or mitigation: *Skinner v. Grant*, 12 Vt. 456. A newspaper report was headed by the words, "Blackmailing by a policeman," and stated that the plaintiff, who was a policeman, had been dis-

¹ *McGregor v. Gregory*, 11 Mees. & W. 287; *Churchill v. Hunt*, 2 Barn. & Ald. 685; *Roberts v. Browne*, 10 Bing. 519; *Biddulph v. Chamberlayne*, 17 Q. B. 351. The complainant alleged the publication of the defamatory words by setting out separately the different portions of the article reflecting on plaintiff. Defendant set up justification of each extract, and the verdict for plaintiff was general. *Held*, that

there was but one count, and that the verdict was sustained by a failure to justify any one of the extracts: *Holmes v. Jones*, N. Y. Sup. Ct., 1889.

² *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102.

³ *Larrabee v. Minn. Tribune Co.*, 36 Minn. 141.

⁴ *Reed v. Harper*, 25 Iowa, 87; 95 Am. Dec. 774.

missed from his office on charges of blackmail. It appeared that the plaintiff had been dismissed for accepting voluntary gifts of money from persons to whom he had rendered official services, without giving notice thereof to the police commissioners, as required by the regulations of the police department. *Held*, no justification: *Edsall v. Brooks*, 2 Rob. (N. Y.) 29. In an action for slander, defendant pleaded that plaintiff was a woman of bad reputation for chastity in the neighborhood of a certain summer resort, and his evidence related only to her reputation in that neighborhood. But it appearing that she was at the resort only a few weeks, and resided in a neighboring town both before and after her residence there, *held*, that evidence of her good reputation at the town was properly admitted on her behalf: *Hanners v. McClelland*, 74 Iowa, 318. The libel complained of was headed, "How Lawyer B. treats his clients," which was followed by a report of a case in which one client of B. had been badly treated. *Held*, that though the particular case was true, justification was not sufficient as to the heading, which implied that B. generally treated his clients badly: *Bishop v. Latimer*, 4 L. T., N. S., 775. The plaintiff, an architect, had been employed by a certain committee to superintend and carry out the restoration of Skirlaugh Church. The defendant, who had no manner of interest in the question of the employment of plaintiff to execute the work, wrote a letter to a member of the committee, saying: "I see that the restoration of Skirlaugh Church has fallen into the hands of an architect who is a Wesleyan, and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" In an action for libel, the defendant, by way of justification, alleged "that the facts contained in the letter are true, and the opinions expressed in it, whether right or wrong, were honestly held and expressed by the defendant," and "that the plaintiff cannot show experience in church work, i. e., of the kind which in the opinion of the defendant was requisite." *Held*, that the justification set up was no justification at all, because the letter obviously meant that the plaintiff could show no experience in the work in which he had been employed by the committee to execute: *Botterill v. Whytehead*, 41 L. T., N. S., 588. In an action of libel for accusing the plaintiff of a criminal offense, the plaintiff, to rebut evidence of justification, offered record evidence of his acquittal of the offense. *Held*, incompetent: *McBee v. Fulton*, 47 Md. 403; 28 Am. Rep. 465.

§ 1281. **Privileged Communications — Absolute and Qualified Privilege.**— Under certain circumstances, words

spoken or written are privileged, and no action lies on their account, though they are defamatory. This exemption is based on the fact that the speaker or writer is considered to have published them under a legal or moral duty, and that it is for the public interest that he shall not be prevented from so doing through the fear of having to respond in damages for so doing. This privilege is either absolute or qualified. It is absolute where the public interest or the administration of justice requires it, and here the privilege is an absolute bar to any action. It is qualified in a variety of other cases where the publication is regarded as confidential. In the first class of cases an action will not lie, even though the publication was false and malicious. In the second class, an action will lie if the words were not used *bona fide*, but the defendant availed himself of the privileged occasion willfully and knowingly to defame the plaintiff. Whether the communication is or is not privileged by reason of the occasion on which it was spoken is a question for the court.¹ If the circumstances are in dispute, this must be decided by the jury.²

§ 1282. Absolute Privilege — Executive of Nation or State. — The absolute privilege extends to the President of the United States, and the governors of the different states.³

§ 1283. Members of Legislative Bodies. — Members of the legislature — of either house of Congress, or of the state legislature — are absolutely privileged as to everything said or written by them as such. And the question as to whether the publication was or was not pertinent to what was before them for official action is immaterial; it is enough that at the time they were acting as legislators, either in the house of which they were members, or on

¹ *Stace v. Griffith*, L. R. 2 P. C. 420.

² *Stace v. Griffith*, L. R. 2 P. C. 420.

³ *Cooley on Torts*, 214.

one of its committees.¹ Whether a like privilege attaches to inferior bodies possessing legislative functions, such as municipal councils, boards of supervisors, etc., is said to be not so clear.² But the privilege is not extended to words spoken unofficially, though in the legislative hall, and while the legislature is in session.³

§ 1284. Witnesses in Judicial Proceedings. — A witness in a court of justice or judicial proceeding is absolutely protected from responsibility for words spoken therein.⁴ Words spoken before a magistrate, by a com-

¹ *Coffin v. Coffin*, 4 Mass. 1; 3 Am. Dec. 190; *State v. Burnham*, 9 N. H. 34; 31 Am. Dec. 217; *Perkins v. Mitchell*, 31 Barb. 461.

² Judge Cooley is of opinion that they would be privileged in their utterances when pertinent to any inquiry or investigation before them, but no further: *Cooley on Torts*, 214.

³ *Coffin v. Coffin*, 4 Mass. 1; 3 Am. Dec. 189.

⁴ *Marsh v. Ellsworth*, 50 N. Y. 309; *Smith v. Howard*, 28 Iowa, 51; *Terry v. Fellows*, 21 La. Ann. 375; *Garr v. Selden*, 4 N. Y. 91; *Bailey v. Dean*, 5 Barb. 297; *Vausse v. Lee*, 1 Hill (S.C.), 197; 26 Am. Dec. 168; *Lea v. White*, 4 Sneed, 111; *Hutchinson v. Lewis*, 75 Ind. 55; *Steinecke v. Marx*, 10 Mo. App. 580; *Liles v. Gaster*, 42 Ohio St. 631; *Hoar v. Wood*, 3 Met. 193; *Shaw, C. J.*, saying: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice, and be actionable themselves, are not actionable, if they are applicable and pertinent to the subject of the inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of the inquiry. And in determining what is pertinent much latitude must be allowed to the judgment and discretion of those who are

intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion not warranted by the occasion no more weight than it deserves. Still, this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and

plainant who has caused one's arrest for a crime, after the defendant has been brought in, averring the truth of his complaint, are not actionable.¹ It is no libel for a witness called in bankruptcy proceedings to certify that the bankrupt had fraudulently omitted certain property in making his inventory.² Statements made by witnesses in an affidavit before a court of competent jurisdiction, in a criminal proceeding, to support a motion for a new trial, based on the averment of newly discovered evidence, are privileged, if applicable, pertinent, and material to the subject before the court, even though false and malicious.³ An investigation by a captain on board a vessel is not such a judicial inquiry as protects persons testifying thereat from responsibility for false and slanderous utterances.⁴ What a witness says in testimony is privileged, even if the court attempted to stop him, provided he had a right to say it as an explanatory part of an answer he had made.⁵ But the words, "That is a lie," spoken to a witness while testifying to a material point in a cause then on trial, are actionable, if spoken by a party maliciously, and with intent to defame such witness.⁶

But the matter must be pertinent and material to the cause or subject-matter of the inquiry.⁷ If a witness, while testifying in court, goes out of his way to utter a slander, his privilege does not protect him.⁸ In the ab-

this freedom of discussion ought not to be impaired by numerous and refined distinctions." See *Hastings v. Lusk*, 22 Wend. 410; 34 Am. Dec. 330. After the examination and acquittal of the plaintiff, the defendant repeated the charge and urged its truth to several persons who were present at the examination. Held, slander, and that it was not excused because spoken to persons who were so present: *Burlingame v. Burlingame*, 8 Cow. 141.

¹ *Allen v. Crofoot*, 2 Wend. 515; 20 Am. Dec. 647.

² *Marsh v. Ellsworth*, 50 N. Y. 309.

³ *Burke v. Ryan*, 36 La. Ann. 951.

⁴ *Webber v. Webber*, Sup. Ct. N. S. Wales, 1884; 1 Aust. W. N. C. 1.

⁵ *Seaman v. Netherclift*, L. R. 1 Com. P. Div. 540; L. R. 2 Com. P. Div. 53.

⁶ *Mower v. Watson*, 11 Vt. 536; 34 Am. Dec. 704.

⁷ *Hoar v. Wood*, 3 Met. 193; *White v. Carroll*, 42 N. Y. 161; 1 Am. Rep. 504; *Calkins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738; *Kidder v. Parkhurst*, 3 Allen, 393; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Warner v. Paine*, 2 Sand. 195; *Marsh v. Ellsworth*, 2 Sweeney, 589; *Wyatt v. Buell*, 47 Cal. 624.

⁸ *Shadden v. McElwee*, 86 Tenn. 146,

sence of an averment to the contrary, the court would presume that the answers were pertinent to the issue, believed to be true, and so privileged.¹ A witness is not answerable for any statements he may make responsive to questions put to him, and which are not objected to and ruled out by the court; or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had.² It is a question for the jury whether answers given by a person in the course of his testimony as a witness, and claimed to be slanderous, were so given under the belief that they were pertinent and relevant to the question at issue, or from malice.³

§ 1285. **Judges.**—A judge has an absolute immunity, and no action can be maintained against him, even though it be alleged that he spoke maliciously, knowing his words to be false, and also that his words were irrelevant to the matter at issue before him, and wholly unwarranted by the evidence.⁴ And this immunity extends to a judge of an inferior court, or a magistrate, so long as he has jurisdiction over the matter in which the words are spoken.⁵

ILLUSTRATIONS.—A judge, while sitting in court and trying an action in which the plaintiff was defendant, said to him: "You are a harpy, preying on the vitals of the poor." The plaintiff was an accountant and scrivener. *Held*, that no action lay for words so spoken by the defendant in his capacity as judge, although they were alleged to have been spoken falsely and maliciously, and without any reasonable or probable cause, or any foundation whatever, and to have been wholly irrelevant to the case before him: *Scott v. Stansfield*, L. R. 3 Ex. 220. A justice of the peace, in response to an order of the county court in an appealed case, made an amended return, and stated therein that plaintiff had slipped a bogus answer among

¹ *Liles v. Gaster*, 42 Ohio St. 631.

² *Calkins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738.

³ *White v. Carroll*, 42 N. Y. 161; 1 Am. Rep. 503.

⁴ *Odgers on Libel and Slander*, 188;

Miller v. Hope, 2 Shaw, 125.

⁵ *Houlden v. Smith*, 14 Q. B. 841;

Paris v. Levy, 9 Com. B., N. S., 342.

the papers in the case. Upon a suit for libel, *held*, that the communication was material and pertinent, and therefore privileged, irrespective of motive: *Aylesworth v. St. John*, 25 Hun, 156.

§ 1286. **Jurors.**—So the consultation of jurors in the jury-room is privileged,¹ and such privilege is not limited to words which are shown to be pertinent to the questions arising for decision.² Any observation made by one of the jury during the trial is equally privileged, provided it is pertinent to the inquiry,³ and so is any presentment by a grand jury.⁴

§ 1287. **Pleadings and Papers in Cause.**—The pleadings and other papers filed by parties in the course of judicial proceedings are privileged.⁵ A bill in chan-

¹ *Dunham v. Powers*, 42 Vt. 1; *Rector v. Smith*, 11 Iowa, 302.

² *Dunham v. Powers*, 42 Vt. 1.

³ *R. v. Skinner*, Loftt, 55.

⁴ *Rector v. Smith*, 11 Iowa, 302.

⁵ *Astley v. Younge*, 2 Burr. 807; *Henderson v. Broomhead*, 4 Hurl. & N. 570; *Wyatt v. Buell*, 47 Cal. 624; *Vausse v. Lee*, 1 Hill (S. C.) 197; 26 Am. Dec. 168; *Lea v. White*, 4 Sneed, 111; *Garr v. Selden*, 4 N. Y. 91; *Hardin v. Cumstock*, 2 A. K. Marsh. 480; 12 Am. Dec. 427; *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Strauss v. Meyer*, 48 Ill. 385; *Lanning v. Christie*, 30 Ohio St. 115; 27 Am. Rep. 431; *Gilbert v. People*, 1 Denio, 41; 43 Am. Dec. 646; *McLaughlin v. Cowley*, 127 Mass. 316; 131 Mass. 70; *Lawson v. Hicks*, 38 Ala. 279; 81 Am. Dec. 49. In an old case "it was adjudged that if one exhibits articles to justices of peace against a certain person, containing divers great abuses and misdemeanors, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound to his good behavior,—in this case the party accused shall not have, for any matter contained in such articles, any action upon the case; for they have pursued the ordinary course of justice in such case; and if actions should be permitted in such cases, those who have just cause of com-

plaint would not dare to complain for fear of infinite vexation": *Cutler v. Dixon*, 4 Coke, 14 b; *Dyer*, 285. In the report of another old case it is said: "If one bring another before a justice of peace for supposition of felony without any just cause, yet no action lies; and if one exhibit a scandalous bill, if the court have jurisdiction of such matters, an action lies not; otherwise, it is if the court have not jurisdiction; or having, if the party publish his bill abroad, the said bill being false": *Weston v. Dobniet*, Cro. Jac. 432. This, so far as it denies an action for the malicious prosecution of a criminal charge, is not the modern law. It is laid down by Mr. Sergeant Hawkins that, "no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel": 1 Hawk. P. C., c. 28, sec. 8. But an action lies where an affidavit is sworn to recklessly and maliciously before a court having no jurisdiction in the matter: *Odgers on Libel and Slander*, 192; citing *Brickley v. Wood*, 4 Rep. 14; *R. v. Salisbury*, 1 Ld. Raym. 341; *Lewis v. Levy*, 3 El. B. & E. 554.

cery prepared by counsel and sworn to, but never filed, is privileged.¹ So are statements made in support of an answer to be used in opposition to an application for an injunction, provided they are not irrelevant and impertinent.² So a defendant in a libel suit cannot be sued for a libel based on allegations in his answer properly pleaded by way of justification and mitigation.³ So a motion based on the Iowa code, section 2906, for an order to an attorney to pay over money to his client, and containing only the essential facts entitling plaintiff to the relief asked, is privileged.⁴ Averments in a petition by a receiver against his co-receiver in a judicial proceeding, that such co-receiver was unlawfully and wrongfully withholding a portion of the assets; that he was obstructing their collection; was acting in contempt of the authority of the court; and had embezzled some of the money belonging to the trust, — although false, and maliciously made, — will not sustain an action for libel, for the reason that every averment of the petition did have a most direct relation to the subject-matter brought before the court under the petition. A declaration averring that the defendant maliciously made use of the process of the court by causing a petition to be filed in said court, for the purpose of having the plaintiff declared in contempt of court, and removed from his

¹ *Burnham v. Roberts*, 70 Ill. 19.

² In a recent case a bill had been filed by a mortgagor to reform the mortgage, and the bill charged an agent of the mortgagee with fraud in connection with the draughting of the mortgage by inserting a provision that the mortgagors should keep the buildings insured. They failing to do this, the mortgagee procured insurance, and commenced foreclosure by advertisement for the sums paid to obtain it, in accordance with the provision in controversy, whereupon the bill mentioned was filed. The agent made his affidavit in support of the answer, and averred therein that the

charge of fraud was willfully and maliciously false, without the least shadow of truth whatever. It was held that an action on these words as a libel would not lie; that what was said was certainly not irrelevant, for it concerned the very substance of the controversy between the parties; and that, though epithets were used which were needless, and added no force to his statements, the privilege was not vitiated by the excess: *Hart v. Baxter*, 47 Mich. 198.

³ *Prescott v. Tousey*, 53 N. Y. Sup. Ct. 56.

⁴ *Hawk v. Evans*, Iowa, 1889.

office of receiver, and to disgrace him in the eyes of another, and that the allegations in said petition were false to the knowledge of the defendant, and that thereby the plaintiff was greatly injured in his feelings, reputation, and business, — does not show a sufficient cause of action for the malicious abuse of the process of the court.¹ So affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice, are privileged.²

The rule applies not merely to the trials of actions and indictments, but includes every proceeding before a competent court or magistrate, in due course of law, which is to result in a decision. It includes a complaint to the fire marshal of a municipal corporation, the design of which is to cause him to institute an inquiry as to the cause of a fire.³ It applies to judicatories which persons may erect for themselves by their voluntary action, as well as to those established for the administration of justice by the law of the land, as, for example, church courts.⁴ But the court must be legally competent to investigate the charges.⁵ And scandalous matter which is wholly impertinent to the subject of the action is not entitled to the privilege. Where one acting as counsel for the plaintiff in a justice's court prepared and filed a declaration, in an action for trespass for breaking the plaintiff's close, and otherwise injuring his sheep, in which, among other provoking expressions concerning the defendant, he inserted allegations that "the defendant was reputed to be fond of sheep, bucks and ewes, and of wool, mutton, and lambs," and to be in the habit of "biting sheep," and

¹ *Bartlett v. Christhilf*, 69 Md. 219.

² *Allen v. Crofoot*, 2 Wend. 515; 20 Am. Dec. 647; *Hartsock v. Reddick*, 6 Blackf. 255; 38 Am. Dec. 141; *Briggs v. Byrd*, 12 Ired. 377; *Worthington v. Scribner*, 109 Mass. 487; 12 Am. Rep. 736; *Eames v. Whittaker*, 123 Mass. 342. Words in an affidavit

upon which a search-warrant for stolen goods is issued are not actionable: *Vausse v. Lee*, 1 Hill, 197; 26 Am. Dec. 168.

³ *Newfield v. Cofferman*, 15 Abb. Pr. 360.

⁴ *McMillan v. Birch*, 1 Binn. 178.

⁵ *Milam v. Burnside*, 1 Brev. 295.

added that "if guilty, he ought to be hanged or shot" — it was held that an indictment charging such matter as libelous, and alleging malice, was good on demurrer, because the matter could not be regarded as pertinent to the subject of the inquiry.¹

Hence where the words are material and pertinent to the judicial or *quasi* judicial injury, and therefore absolutely privileged, the truth or falsity of them is immaterial, and cannot be drawn in question in an action for slander or libel; nor is it necessary in such an action for the defendant to deny the allegation of malice.² Where the privilege exists, the motive with which the words were uttered is an immaterial inquiry.³

ILLUSTRATIONS. — Stockholders of a corporation filed a petition in a court having jurisdiction of the cause against the corporation, alleging that the president, with the approval of the directors, had been fraudulently conducting the management of the company, detailing the acts alleged to show a concerted scheme to reduce the value of the company's stock, and buy it in, and control the company's affairs, and thus destroy the plaintiff's interests, and asked for the appointment of a receiver. *Held*, that a director of the company, though not a party to the suit, could not maintain an action for alleged defamatory matter contained in the petition, though it was false and malicious, and made under color and pretense of a suit without right: *Runge v. Franklin*, Tex. 1889.

§ 1288. **Counsel and Attorney.** — And counsel engaged in a case have a similar protection.⁴ An attorney who

¹ *Gilbert v. People*, 1 Denio, 41, the court saying: "The words could have no possible bearing on the issue to be tried, or the damages which might be assessed for the alleged trespass, although they might very well serve to irritate and disgrace the party who was charged to be the subject of such reports and habits. It would be lamentable if irrelevant, gratuitous, and malicious attacks could be excused, because inserted in the declaration upon other and distinct causes of action, and with which the vituperative charges had no connection whatever."

² *Garr v. Selden*, 4 N. Y. 91; *Hastings v. Lusk*, 22 Wend. 410; 34 Am. Dec. 330; *Hoar v. Wood*, 3 Met. 193, 197.

³ *Marsh v. Ellsworth*, 50 N. Y. 309; *Gilbert v. People*, 1 Denio, 41; *Ring v. Wheeler*, 7 Cow. 725.

⁴ See *ante*, title Agency — Attorney and Client; *Maulsby v. Reifsnider*, 69 Md. 143. "Neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office": *Lord Mansfield in R. v. Skinner*, Loft. 55.

files specifications of opposition to an insolvent's discharge, alleging that the insolvent had been privy to false and fraudulent entries in his books, had sworn falsely in relation to his estate, and, in a fiduciary capacity, had fraudulently converted property to his own use, which information he had derived from his client, is not liable to an action.¹

§ 1289. **Military Courts.**—Defamatory communications made by witnesses or officials to a court-martial, or to a court of inquiry instituted under articles of war, are absolutely privileged.²

¹ Hollis v. Meux, 69 Cal. 625; 58 Am. Rep. 574.

² Keighley v. Bell, 4 Fost. & F. 763; Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 7 H. L. Cas. 744. In this case—a leading one on the subject—the facts of the case were as follows: The plaintiff, Lieutenant-Colonel Dawkins, having been reported to have exhibited on several occasions a want of deference to some of his superior officers, and to have been guilty of other unofficer-like conduct, and also to have made certain charges against several of his brother officers, the commander in chief directed that a court of inquiry should be assembled; and that these matters should be inquired into and reported upon. A court of inquiry was held, and Lord Rokeby was required to attend, and did accordingly attend, as a witness before this court. In the course of his *viva voce* evidence before that court, Lord Rokeby made serious charges against the plaintiff. On the trial the question arose, whether an action will lie against a military man for statements made by him in the course of a military inquiry in relation to the conduct of the plaintiff, also a military man, and with reference to the subject of the inquiry, where the plaintiff shall have proved that the defendant has acted *mala fide* and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements so made by him are false. Mr. Justice

Blackburn ruled that no such action would lie, and the court of exchequer chamber supported his decision. On appeal to the house of lords, this ruling was sustained, after lengthy and elaborate arguments, the lord chancellor saying: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle, we apprehend, is, that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform. In the present case it appears in the bill of exceptions that the words and writings complained of were published by the defendant, a military man bound to appear and give testimony before a court of inquiry. All he said and wrote had reference to that inquiry, and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice."

§ 1290. **Qualified Privilege — Duty to Society.** — A qualified privilege attaches to a communication made by a person to another in pursuance of a duty to society, and it is sufficient that the defendant should honestly believe that he has a duty to perform in the matter, although it may turn out that the circumstances were not such as he reasonably concluded them to be.¹ It is then privileged, unless express malice is shown.² But it is essential that the defendant should honestly believe his statement to be true;³ and the communication must be made at a proper time and in a proper manner.⁴ A communication privileged as between the sender and the receiver may lose the privilege if sent unnecessarily by postal card or telegram.⁵ Although a letter be written in good faith, as a confidential communication, for the purpose of obtaining information to which the writer is properly entitled, yet if it contain comments of a slanderous nature, referring to an indi-

¹ *Whiteley v. Adams*, 15 Com. B., N. S., 392; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514.

² *Faris v. Starke*, 9 Dana, 128; 33 Am. Dec. 536; *Hart v. Reed*, 1 B. Mon. 166; 35 Am. Dec. 179; *Holt v. Parsons*, 23 Tex. 9; 76 Am. Dec. 49; *Moore v. Butler*, 48 N. H. 161. Mere secrecy in a communication is not sufficient to remove the implication of malice; but taken in connection with other circumstances, it may confirm the inference that it was done from a good motive: *Faris v. Starke*, 9 Dana, 128; 33 Am. Dec. 536.

³ "To entitle matter otherwise libelous to the protection which attaches to communications made in the fulfillment of a duty *bona fides*, or to use our own equivalent, honesty of purpose, is essential; and to this, again, two things are necessary: 1. That the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; 2. That it be made with a belief of its truth": *Cockburn, C. J.*, in *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 102.

⁴ *Holt v. Parsons*, 23 Tex. 9; 76 Am.

Dec. 49. "Even where the expressions employed are allowable in all respects, still the mode of publication may take them out of the privilege. Confidential communications should not be shouted across the street for all passers-by to hear. Nor should they be committed to a post card or a telegram which others will read. They should be sent in a letter properly sealed and fastened. If the words be spoken, the defendant must be careful in whose presence he speaks. He should choose a time when no one else is by except those to whom it is his duty to make the statement. It is true that the accidental presence of some third person, unsought by the defendant, will not take the case out of the privilege; but it would be otherwise if the defendant purposely sought an opportunity of making a communication *prima facie* privileged in the presence of the very persons who were most likely to act upon it to the prejudice of the plaintiff": *Odgers on Libel and Slander*, 200.

⁵ *Williamson v. Freer*, L. R. 9 Com. P. 393; 10 Moak, 225.

vidual concerning whom no information was expected or desired, and foreign to the avowed object for which it was written, it is libelous.¹ And it must be made to a proper person. A statement that a person is fit for a lunatic asylum is none the less libelous because the statement is made by a physician as his professional opinion, it not being made to a person to whom it was his duty to make it.² So a statement made by a physician that an unmarried female patient is pregnant is not a privileged communication, unless it be made in good faith to one who is reasonably entitled to receive the information.³ But it does not necessarily lose its privilege by being made in the presence of a third person.⁴ If one writes a letter containing defamatory statements to one who has an interest therein, by reason of which fact the law protects it as privileged, he will not be liable if he, by mistake, places the letter in an envelope addressed to a stranger, who receives it and reads it.⁵

§ 1291. **As to Character of Servants.**—A case of privilege of this kind which often arises is where a person is asked as to the character of a former servant by one to whom he or she has applied for a situation. A duty is thereby cast upon the former master to state fully and honestly all that he knows either for or against the servant; and any communication made in the performance of his duty is privileged, even though it should turn out that the former master is mistaken.⁶ But if a master falsely and maliciously gives a servant a bad character, his communication is not privileged.⁷ So where a mer-

¹ *Cole v. Wilson*, 18 B. Mon. 212.

² *Perkins v. Mitchell*, 31 Barb. 461.

³ *Alpin v. Morton*, 21 Ohio St. 536.

⁴ *Toogood v. Spyring*, 1 Crompt. M. & R. 181; *Billings v. Fairbanks*, 139 Mass. 66.

⁵ *Tompson v. Dashwood*, 48 J. P. 55.

⁶ *Pattison v. Jones*, 8 Barn. & C. 578; *Storey v. Challands*, 8 Car. & P. 234; *Dunman v. Bigg*, 1 Camp. 269,

note; *Amann v. Damm*, 8 Com. B., N. S., 597; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418; *Elam v. Badger*, 23 Ill. 498; *White v. Nicholls*, 3 How. 266; *Lewis v. Chapman*, 16 N. Y. 375; *Fowles v. Bowen*, 30 N. Y. 20; *Noonan v. Orton*, 32 Wis. 106; *Hatch v. Lane*, 105 Mass. 394; *Atwill v. Mackintosh*, 120 Mass. 177.

⁷ *Rogers v. Clifton*, 3 Bos. & P. 587.

chant in discharging a clerk has given him a letter of recommendation, a subsequent communication to a new employer of facts which he has since learned which caused him to doubt his honesty is privileged.¹ So a communication by the new employer to the old one saying that the servant does not deserve the character he gave her is privileged.² A master may volunteer information to a new employer without being asked, but when he "volunteers to give the character, stronger evidence will be required that he acted *bona fide* than in the case where he has given the character after being required so to do."³ If a master about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away the privilege from words which the master then uses imputing dishonesty.⁴ A pamphlet containing the names of discharged employees of a railroad company, with reasons for their discharge, and placed by the railroad company in the hands of persons whose duty it is to employ servants on behalf of the company, is a privileged communication.⁵

ILLUSTRATIONS. — A, on being applied to for the character of B, who had been his saleswoman, charged her with theft. He had never made such a charge against her till then; he told her that he would say nothing about it if she resumed her employment at his house; subsequently he said that if she would acknowledge the theft he would give her a character. *Held*, that there was abundant evidence that the charge of theft was made *mala fide*, with the intention of compelling B to return to A's service: *Jackson v. Hopperton*, 16 Com. B., N. S., 829. A master discharged his footman and cook, and they asked him his reason for doing so, and he told the footman, in the absence of the cook, that "he and the cook had been robbing him," and told the cook, in the absence of the footman, that he had discharged her "because she and the footman had been robbing him." *Held*, that these were privileged communications as respected the absent parties, as well as those to whom they were respectively made: *Manby v. Witt*, 18 Com. B. 544; 25 L. J. C. P. 294.

¹ *Fowles v. Bowen*, 30 N. Y. 20.

⁴ *Taylor v. Hawkins*, 16 Q. B. 308.

² *Dixon v. Parsons*, 1 Fost. & F. 24.

⁵ *Missouri Pacific R. R. Co. v. Richmond, Tex.*, 1889.

³ *Pattison v. Jones*, 8 Barn & C. 586.

§ 1292. **Answers to Confidential Inquiries.** — Answers to private and confidential inquiries made as to another are qualifiedly privileged,¹ provided the defendant honestly believes in the truth of what he says, and his communication is relevant to the inquiry made of him.² Words spoken to a landlord in answer to inquiries by him as to the character of a tenant are privileged communications, if spoken without malice.³ When once such a confidential inquiry is set on foot, all subsequent interviews between the parties are privileged, so long as what takes place thereat is still relevant to the original inquiry.⁴

ILLUSTRATIONS. — W. met P., and, addressing him, said: "I hear that you say the bank of B. and S. has stopped. Is it true?" P. answered: "Yes; it is. I was told so. It was so reported at C., and nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if P. understood W. to be asking for information by which to regulate his conduct, and spoke the words merely by way of honest advice, they were *prima facie* privileged: *Bromage v. Prosser*, 4 Barn. & C. 247; 1 Car. & P. 475. Defendant was asked to sign a memorial the object of which was to retain the plaintiff as trustee of a charity, from which office he was about to be removed. Defendant refused to sign, and on being pressed for his reasons, stated them explicitly. *Held*, privileged: *Cowles v. Potts*, 34 L. J. Q. B. 247; 11 Jur., N. S., 946. Plaintiff was a London merchant who had had business relations with the London and Yorkshire Bank. Defendant, the manager of that bank, on being applied to by one H. for information about the plaintiff, showed H. an anonymous letter which the bank had

¹ *Storey v. Chaliands*, 8 Car. & P. 234. "Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made": *Robshaw v. Smith*, 38 L. T., N. S., 423. It appears to me that if you ask a question of a person who you believe to have the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is privilege communication. I might illustrate this by the instances of inquiries being made of a friend or a neighbor about a tradesman, a doctor, or a solicitor. Society could not go

on without such inquiries. The whole doctrine of privilege must rest upon the interest and necessities of society. If every one was open to an action for libel or slander for the answers he might make to such inquiries, it would be very injurious to the interests of society": Jessel, M. R., in *Waller v. Loch*, L. R. 7 Q. B. Div. 619.

² *Odgers on Libel and Slander*, 205.

³ *Liddle v. Hodges*, 2 Bosw. 537.

⁴ *Beatson v. Skene*, 5 Hurl. & N. 838; *Hopwood v. Thorn*, 8 Com. B. 293; *Wallace v. Carroll*, 11 Ir. C. L. Rep. 485.

received about the plaintiff, and which contained the libel in question. *Held*, that handing H. the letter in confidence was privileged: *Robshaw v. Smith*, 38 L. T., N. S., 423.¹ A sheriff levied upon certain cattle, and they were subsequently driven away by other parties, and the sheriff employed A, a student at law, to ascertain the facts, and advise him what to do, and A afterwards wrote to the sheriff that he had ascertained that B had been seen driving off the cattle, and advised him to prosecute B for larceny, as he had no doubt that the cattle were feloniously taken. *Held*, a privileged communication, and that B could not maintain an action for libel against A upon it, without proof of actual malice: *Washburn v. Cook*, 3 Denio, 110. The defendant had suspected, and declared his suspicions, that a person's wife had committed larceny, but upon being inquired of by that person whether his suspicions continued, replied that he was now satisfied that A B (a hired maid) stole it. *Held*, that if the communication was privileged at all, the defamatory matter, going further than to satisfy the inquirer that there was reason for the suspicions to cease, went beyond the exigency of the occasion: *Robinett v. Ruby*, 13 Md. 95. Plaintiff had been tenant to the defendant; a wine-broker went to defendant to ask him plaintiff's present address. Defendant commenced to abuse the plaintiff. The broker said: "I don't come to inquire about his character, but only for his address; I have done business with him before." But the defendant continued to denounce the plaintiff as a swindler, adding, however, "I speak in confidence." The broker thanked defendant for his remarks, and declined in future to trust the plaintiff. *Held*, rightly left to the jury to say if defendant spoke *bona fide* or maliciously: *Picton v. Jackman*, 4 Car. & P. 257. A was discharged from his employer's service, and on applying to his employer's agent to know why, he was told for stealing. *Held*, that as he had asked the question, and as the answer was given in good faith, there was no cause of action for slander: *Beeler v. Jackson*, 64 Md. 589.

¹ The court saying: "The defendant did not act as a volunteer, but was applied to for information. When applied to he did give such information as he possessed. He might have refused to give that information. He had no legal duty cast upon him to give any opinion. But he was entitled to give his opinion when asked, and *a fortiori*, as it seems to me, to show any letters he had received bearing on the subject. If one man shows another a letter, he leaves him to estimate what value attaches to it; whereas any

opinion he gives might be based on very insufficient grounds. It is better to state facts than to give an opinion. Every one owes it as a duty to his fellow-men to state what he knows about a person, when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be maintained. An anonymous letter is usually a very despicable thing. But anonymous letters may be very important, not by reason of

§ 1293. **Information Volunteered.** — And in certain cases a person may volunteer information as to another; though where no inquiry is made of the party, it requires a stronger case to justify the communication.¹ The defendant is “entitled to judgment if the jury find that he reasonably acted under an honest sense of duty, desiring to serve the person most concerned, and not from any self-seeking motive. But there must be some circumstances proved before them, showing that such a sense of duty was reasonably possible. It is not sufficient for the defendant merely to swear, ‘I acted under a sense of duty.’ The defendant is not to be punished for merely being over-conscientious; but on the other hand, it is clear law that a man is not justified in repeating information he has received prejudicial to the plaintiff merely because he sincerely believes it to be true.”² There is no rule of law on the subject; whether the circumstances justified the communication can be the only test. “It appears to be clear that if the defendant reasonably supposes that human life would be seriously imperiled by his remaining silent, he may volunteer information to those thus endangered, or to their master, though he be not himself personally concerned. So, if the money or goods of the person to whom he speaks would be in great and obvious danger of being stolen or destroyed. So, too, it appears that the defendant may, without being applied to for the information, acquaint a master with the misconduct of his servants, if instances thereof have come under the especial notice of the defendant, and have been concealed from the master’s eye. But in most other cases the defendant runs a great risk in volunteering statements which afterwards turn out to be inaccurate, unless, indeed,

what they say, but because they lead to inquiry, which may substantiate what they have said. It seems to me, therefore, that he was fully entitled to show this anonymous letter for what it was worth.”

¹ Odgers on Libel and Slander, 207.

² Odgers on Libel and Slander, 214; citing *Botterill v. Whytehead*, 41 L. T., N. S., 588.

he is himself personally interested in the matter, or compelled to interfere by the fiduciary relationship in which he stands to some person concerned.”¹ It has been held that one who has an opportunity of seeing malpractices on the part of servants may write to their master exposing them.² The occupier of a house may complain to the landlord of the conduct of workmen sent to repair it.³ A church member may write to the bishop of the diocese concerning the conduct of a minister.⁴

Statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to inquiries, are not privileged communications.⁵ So a libelous communication is not privileged when made to an unmarried woman concerning her suitor, by the fact that she, some years before, had requested to be informed of anything the defendant knew “about any young man she went with, or, in fact, any young man in the place,” if the defendant was not a relative of such young woman, and owed no special duty to her.⁶ Stating that a com-

¹ Odgers on Libel and Slander, 216.

² Cleaver v. Sarraude, 1 Camp. 268; Kine v. Sewell, 3 Mees. & W. 297; Amann v. Damm, 8 Com. B., N. S., 597.

³ Toogood v. Spyring, 1 Crompt. M. & R. 181.

⁴ James v. Boston, 2 Car. & K. 4.

⁵ Krebs v. Oliver, 12 Gray, 239.

⁶ Byam v. Collins, 111 N. Y. 143;

⁷ Am. St. Rep. 726; the court saying: “The general rule is, that in the case of a libelous publication the law implies malice, and infers some damage. What are called ‘privileged communications’ are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: ‘A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest

or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.’ Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has

munication made is made confidentially, or marking a letter "private and confidential," does not make the communication confidential and privileged, unless it was a communication which the defendant had a right to make under the rules just given.¹

ILLUSTRATIONS. — N. selected plaintiff to be his attorney in an action. Defendant, apparently a total stranger, wrote to N. to deprecate his so employing the plaintiff. *Held*, not a confidential communication: *Godson v. Home*, 1 Ball & B. 7. H. was about to deal with S., when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with S., you will live to repent it; he is a most unprincipled man." *Held*, not a confidential communication: *Storey v. Challands*, 8 Car. & P. 234. The first mate of a ship wrote a letter to the defendant, an old friend, stating that he was placed in an awkward position owing to the drunken habits of the captain, and saying, "How shall I act? It is my duty to write to Mr. Ward [the owner of the ship], but my doing so would ruin" the captain and his wife and family. The defendant, after much deliberation and consultation with other nautical friends, thought it his duty to show the letter to Ward, who thereupon dismissed the captain. The defendant knew nothing of the matter, except from the mate's letter. *Held*, that the letter was privileged: *Coxhead v. Richards*, 2 Com. B. 569, but by a divided court. See *Amann v. Damm*, 8 Com. B., N. S., 597. D. told S. that he intended to employ the plaintiff as surgeon and accoucheur at his wife's approaching confinement. S. thereupon advised him not to do so, on account of the plaintiff's alleged immorality. *Held*, a privileged communication, though it was volunteered: *Dixon v. Smith*, 29 L. J. Ex. 125; 5 Hurl. & N. 450. A and B were share-

an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. . . . Mrs. Collins, then, appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given

any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case, the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true."

- *Picton v. Jackman*, 4 Car. & P. 257.

holders in the same railway company. B was also a river commissioner. The plaintiff had been engineer to the railway company, and was seeking to be elected engineer to the river commissioners. Shortly before the election, A voluntarily wrote to B that the plaintiff's mismanagement or ignorance had cost the railway company several thousand pounds. The defendant lost the appointment in consequence. *Held*, not a privileged communication: *Brooks v. Blanshard*, 1 Crompt. & M. 779; 3 Tyrw. 844. The defendant was a director of two companies; of one of which the plaintiff was secretary, of the other auditor. The plaintiff was dismissed from his post as secretary of the first company for alleged misconduct. Thereupon the defendant, at the next meeting of the board of the second company, informed his co-directors of this fact, and proposed that he should also be dismissed from his post of auditor of the second company. *Held*, a privileged communication: *Harris v. Thompson*, 13 Com. B. 333. D met C in the road and asked him if he had sold his timber yet. C replied that B was going to have it. D asked if he was going to pay ready money for it, and being answered in the negative, said, "Then, you'll lose your timber; for B owes me about twenty-five pounds, and I am going to arrest him next week for my money, and your timber will help to pay my debt." C consequently declined to sell the timber to B. B really did owe D about twenty-three pounds. *Held*, that the caution was unprivileged, because volunteered: *Bennett v. Deacon*, 2 Com. B. 628; 15 L. J. Com. P. 289, but by a divided court. In an action by plaintiff, who had been defendant's tenant at will, against the landlord for slander in stating that the tenant had willfully burned the buildings, it appeared that the statement made by defendant was in the course of the consideration by the judiciary committee of the legislature of a proposed bill as to liability of tenants at will, defendant having been instrumental in bringing the matter to the attention of the legislature; but it did not appear that he was sworn as a witness before the committee, nor that they regarded him as such, nor that the statement was in reply to any question put to him by the committee. *Held*, that the communication was privileged, if defendant acted in good faith and without malice: *Wright v. Lathrop*, Mass. 1889. The defendant, a parishioner, mentioned to her rector a report, widely current in the parish, that the rector and his solicitor were grossly mismanaging a trust estate, and defrauding the widow and orphans, etc. The solicitor brought an action for the slander. The jury found that she did so in the honest belief that it was a benefit to the rector to inform him of the report, in order that he might clear his character. *Held*, that the statement was privileged so far as the rector was concerned,

and that, as it was not divisible, it was also privileged as to the plaintiff: *Davies v. Snead*, L. R. 5 Q. B. 611. A woman whose friend contemplated marriage wrote to her imputations on the character of the man whom she proposed to marry. The motive of the communication was love and friendship. *Held*, that he could maintain an action for libel: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

§ 1294. **Same—Confidential Relationship.**—But where there is a confidential relation existing between the parties, information to the interest of the person to know may properly be volunteered. Thus an agent has a right to give unasked all he knows of a person who is dealing with his principal.¹ So a father, guardian (or a relation), or an intimate friend, may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor, though in the same circumstances it might be considered officious and meddlesome if a mere stranger gave such a warning. So if the defendant is in the army or in a government office, it would be his duty to inform his official superiors of any serious misconduct on the part of his subordinates; for the defendant is in some degree answerable for the faults of those immediately under his control.² Confidential communications between a party and his professional adviser, whether legal, medical, or spiritual, fall within the same principle.³ So words spoken by an employer to his overseer, intended to protect the employer's private interests and property, but not spoken maliciously, are not actionable, although no confidence was expressed at the time of speaking, and although the same words published under other circumstances would be slander.⁴ A communication made by one to the agent

¹ *Davis v. Reeves*, 5 Ir. C. L. Rep. 79; *Todd v. Hawkins*, 2 Moody & R. 20; *Wright v. Woodgate*, 2 Crompt. M. & R. 573; *Washburn v. Cooke*, 3 Denio, P. 606; *Scarll v. Dixon*, 4 Fost. & F. 110; *Knowles v. Peck*, 42 Conn. 386; 250; *Perkins v. Mitchell*, 31 Barb. 461. 19 Am. Rep. 542.

² *Ogders on Libel and Slander*, 210; ³ *Cooley on Torts*, 216.

⁴ *Easley v. Moss*, 9 Ala. 266.

or president of an insurance company, in which plaintiff's property was insured at the time of its destruction by fire, charging plaintiff with arson in setting fire thereto, and with perjury in making proofs of loss, is conditionally privileged.¹ Reports by one employed by a father to ascertain the standing of his daughter's husband, made to the father and mother, are privileged.²

But a communication is not privileged because made by the party in the conviction that he owed a social duty to give currency to libelous rumors, that the victim of them may be avoided.³ There is no privilege to a stranger who interferes in negotiations of marriage, though there would be to a near relative.⁴ There is no privilege to a priest in making charges against members of his congregation in relation to their business from the pulpit.⁵

ILLUSTRATIONS. — Rumors being in circulation prejudicial to the character of the plaintiff, a minister, he courted inquiry, and appointed A to sift the matter thoroughly. It was agreed that the defendant should represent the malcontent portion of the congregation, and state the case against the plaintiff to A. *Held*, that a confidential relationship being thus established between the defendant and A, all that took place between them, whether by word of mouth or in writing, so long as the inquiry lasted, and relative thereto, was privileged: *Hopwood v. Thorn*, 8 Com. B. 293. Defendant dismissed his apprentice without sufficient legal excuse; he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. *Held*, that this letter was privileged, as there was a confidential relationship between the girl's master and her parents: *James v. Jolly*, Odgers on Libel and Slander, 212. Defendant and T. were joint owners of the Robinson, and engaged the plaintiff as master; in April, 1843, defendant purchased T.'s share; in August, 1843, defendant wrote a business letter to T., claiming a return of £150, and incidentally libeled the plaintiff. *Held*, a privileged communication, as the defendant and T. were still in confidential relationship: *Wilson v. Robinson*, 7 Q. B. 68. A New Orleans firm, in private corre-

¹ *Noonan v. Orton*, 32 Wis. 106.

² *Atwill v. Mackintosh*, 120 Mass. 17.

³ *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

⁴ *Joannes v. Bennett*, 5 Allen, 170; 81 Am. Dec. 738; *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

⁵ *Fitzgerald v. Robinson*, 112 Mass. 371.

spondence with a New York house, repeated information received from its own correspondent at Mobile as to a firm at Mobile, as follows: "D. & Co. are people of no standing or credit whatsoever. Neither have they any means. Up to last July they were dealers in chickens, eggs, etc. Since that time they have been buying cotton quite freely, to the general astonishment of the community. . . . We told them we could never touch their bills again, unless they wrote us a letter stating their means, and which we would forward to your good selves, subject to your approval. They were furious enough, but up to now we never received that promised letter." *Held*, that the matter was privileged: *Dunsee v. Norden*, 36 La. Ann. 78. At the suit of the owner of a patent for vulcanized rubber, A, a dentist, was enjoined from using the preparation. Believing that A disregarded the injunction, the owner employed B to ascertain. B procured C to apply to A for a set of teeth upon a plate of vulcanized rubber. A made the teeth upon such plate, delivered them to C, and received pay therefor. B and C reported the facts to the owner, and on their affidavits, proceedings for contempt were commenced against A. *Held*, that the communications of B and C to the owner of the patent were privileged: *Knowles v. Peck*, 42 Conn. 386; 19 Am. Rep. 542.

§ 1295. **Same—Statements to Officers of the Law and Public Authorities.**—Statements made to the officers of the law for the purpose of discovering a crime or bringing a guilty person to justice are privileged, provided they are made on reasonable grounds, honestly, and without malice, even though unfounded.¹ It is the duty of all who witness or are cognizant of any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared *bona fide* and forwarded to the proper authorities, are privileged.² So a petition to the appointing power in

¹ *Amann v. Damm*, 8 Com. B., N. S., 597; *Bunton v. Worley*, 4 Bibb, 98; 7 Am. Dec. 735; *Eames v. Whitaker*, 123 Mass. 342; *Sands v. Robison*, 12 Smedes & M. 704; 51 Am. Dec. 133; *Shock v. McChesney*, 4 Yeates, 507; 2 Am. Dec. 415.

² *Harrison v. Bush*, 5 El. & B. 344; *Reid v. De Lorme*, 2 Brev. 76; *Vanderzee v. McGregor*, 12 Wend. 545; 27 Am. Dec. 156; *Howard v. Thompson*, 21 Wend. 319; 34 Am. Dec. 238; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418; *Bodwell v. Osgood*, 3 Pick.

favor of or against an applicant for an office, or in reference to the conduct of an official, is privileged.¹ It is not necessary that the informant or memorialist should be in any way personally aggrieved or injured; for all persons have an interest in the pure administration of justice and the efficiency of the public service.² An action for libel will not lie without proof of express malice for presenting to a board of excise a remonstrance against granting the plaintiff a tavern license, charging him with being a professional pettifogger and stirring up suits and endeavoring to have justices' courts appointed at his tavern.³ So a communication made by a citizen to the trustees or to a school commissioner in good faith is privileged, although detrimental to the moral character of a teacher.⁴ And so is a petition to a town council to remove a constable.⁵ So words concerning a city attorney, that "he is unfit to hold the office of city attorney; his opinion is too easily warped for money consideration," spoken by the mayor to the city council, which has power to remove the attorney, are privileged.⁶

The privilege attaches to a petition while it is being circulated for signatures as well as after it is presented.⁷

379; 15 Am. Dec. 228; *Cook v. Hill*, 3 Sand. 341; *Van Wyck v. Guthrie*, 4 Duer, 268; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Larkin v. Noonan*, 19 Wis. 82; *Young v. Richardson*, 4 Ill. App. 364. Every communication is privileged which is "made *bona fide* with a view to obtain redress for some injury received, or to prevent or punish some public abuse. . . . This privilege, however, must not be abused; for if such a communication be made maliciously, and without probable cause, the pretence under which it is made, instead of furnishing a defense, will aggravate the case of the defendant": *Fairman v. Ives*, 5 Barn. & Ald. 647.

¹ *Vanarsdale v. Laverty*, 69 Pa. St. 103; *Whitney v. Allen*, 62 Ill. 472; *Thorn v. Blanchard*, 5 Johns. 508;

Gray v. Pentland, 2 Serg. & R. 23; *Larkin v. Noonan*, 19 Wis. 82; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228; *Harris v. Huntington*, 2 Tyler, 129; 4 Am. Dec. 728; *Cook v. Hill*, 3 Sand. 341; *Harwood v. Keech*, 4 Hun, 389.

² *Woodward v. Lander*, 6 Car. & P. 548.

³ *Vanderzee v. McGregor*, 12 Wend. 545; 27 Am. Dec. 156.

⁴ *Decker v. Gaylord*, 35 Hun, 584; *Harwood v. Keech*, 6 Thomp. & C. 665; 4 Hun, 389; *Halstead v. Nelson*, 36 Hun, 149.

⁵ *Kent v. Bongartz*, 15 R. I. 72; 2 Am. St. Rep. 870.

⁶ *Greenwood v. Cobbey*, Neb. 1889.

⁷ *Vanderzee v. McGregor*, 12 Wend. 545; 27 Am. Dec. 156; *Streety v. Wood*, 15 Barb. 105.

But a paper in the form of a petition, but not meant to be presented, is not within the privilege.¹

The complaint must be made to a person who has jurisdiction to entertain it, and power to act in the matter.² But if made to the wrong person, through the defendant's mistake as to the jurisdiction of the particular personage to whom he is complaining, this will not take the case out of the privilege.³ In an English case⁴ a letter to the secretary at war, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer in the army) to pay a debt due from him to defendant, was held privileged, although the secretary at war had no direct power or authority to order the plaintiff to pay his debt. "It was an application," said Best, J., "for the redress of a grievance, made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress." But where one exercises the citizen's right to denounce the action of a public officer, it is unlawful for him to make a false and malicious charge of crime or misdemeanor in office.⁵

ILLUSTRATIONS. — M. sent his servant, the plaintiff, to the defendant's shop on business; while there, the plaintiff had occasion to go into an inner room. Shortly after he left, a box was missed from that inner room. No one else had been in the room except the plaintiff. The defendant thereupon went round to M.'s, and, calling him aside into a private room, told him what had happened, adding that the plaintiff must have taken the box. Later on, the plaintiff came to the defendant's house, and the defendant repeated the accusation to him; but an English girl being present, defendant was careful to speak in German. *Held*, that both communications were privileged,

¹ *State v. Burnham*, 9 N. H. 34; 31 Am. Dec. 217.

² *Blagg v. Sturt*, 10 Q. B. 899; *Homer v. Loveland*, 19 Barb. 111. The publication in a newspaper of an attack upon a person not a candidate for the votes of the people, but for those of an appointing power, is not privileged: *Hunt v. Bennett*, 19 N. Y. 173.

³ *Scarll v. Dixon*, 4 Fost. & F. 250; *Harrison v. Bush*, 5 El. & B. 344; *Kershaw v. Bailey*, 1 Ex. 743; *McIntyre v. McBean*, 13 U. C. Q. B. 534.

⁴ *Fairman v. Ives*, 5 Barn. & Ald. 642.

⁵ *Rowand v. De Camp*, 96 Pa. St. 493; *Bourreseau v. Detroit etc. Co.*, 63 Mich. 425; 6 Am. St. Rep. 320.

if made without actual malice, and in the *bona fide* belief of their truth: *Amann v. Damm*, 8 Com. B., N. S., 597; 29 L. J. Com. P. 313. H. was T.'s shopman, when he left and went to another town, receiving from T. a good character for steadiness, honesty, and industry. Afterwards T. found one of his female servants in possession of some of his goods. When charged with stealing them, she said that H. gave them to her. Thereupon T., though he knew the girl was of bad character, went to H.'s relations and charged him with felony, and eventually induced them to give him fifty pounds to say no more about the matter. *Held*, that the charge of felony was not made *bona fide*, with a just intention to promote investigation or prosecution, but with a view to a compromise, and was altogether unprivileged: *Hooper v. Truscott*, 2 Bing. N. C. 457; 2 Scott, 672. A lieutenant in the navy was appointed by the government agent or superintendent on board a transport ship, the *Jupiter*. He wrote a letter to the secretary at Lloyd's, imputing misconduct and incapacity to the plaintiff, the master of the *Jupiter*. *Held*, altogether unprivileged; the information should have been given to the government alone, by whom the defendant was employed: *Harwood v. Green*, 3 Car. & P. 141. A city physician is appointed by the city council, and not elected by the people. A newspaper charges that he is guilty of unprofessional conduct. *Held*, not privileged, as not made to the proper authority, viz., the council, who had power to remove him, but the public, who had not: *Foster v. Scripps*, 39 Mich. 376; 33 Am. Rep. 403. A professor of the United States Naval Academy at Annapolis placed his written resignation in the hands of the superintendent of the academy, to be forwarded to the Secretary of the Navy. The superintendent, being required by law to indorse his opinion thereon, indorsed his opinion stating why he thought the resignation should be accepted. *Held*, that this indorsement was presumptively a privileged communication: *Maurice v. Worden*, 54 Md. 233; 39 Am. Rep. 384. The mayor of a city, who was *ex officio* chief of police, upon the information of some boys who had been arrested for stealing, called at the store of M. for the purpose of finding the stolen goods, and charged him with having purchased such goods, knowing them to be stolen. *Held*, a privileged communication, not actionable without proof of malice in fact: *Mayo v. Sample*, 18 Iowa, 306. Certain citizens of a town prayed for the removal of a constable from office on the grounds of want of principle, of ignorance, and of misconduct. *Held*, in the constable's action for libel, that he must show express malice as well as that the statements were false, before he could recover: *Kent v. Bongartz*, 15 R. I. 72; 2 Am. St. Rep. 870. To prevent the licensing of an applicant as a teacher, persons inter-

ested in the school in question represented to the superintendent, in a petition and affidavit, that the applicant was a person of bad moral character, and unfit to have charge of a school. Being sued by him for libel, they justified, and showed that he was habitually profane, and a sabbath-breaker. *Held*, that the communication was privileged: *Wieman v. Mabee*, 45 Mich. 484; 40 Am. Rep. 477. Defendants were alleged to have signed and caused to be published in a newspaper a petition signed by them as tax-payers, requesting the resignation of plaintiff, a county commissioner, assigning as reasons, among others, "because it is contrary to our system of laws that any man should sit in judgment or pass upon any right, real or imaginary, wherein he may have a pecuniary interest," "because your actions show you to be a commissioner for [plaintiff] only, and not for precinct No. 1." *Held*, that the statements were not privileged: *Cotulla v. Kerr*, Tex. 1889.

§ 1296. **Common Interest.**—A communication is privileged where the defendant has an interest in the subject-matter of the communication, and the person to whom it is made has a corresponding interest.¹ In a very late case it is laid down that a libelous communication is privileged, if made *bona fide*, upon any subject-matter in which the party communicating has an interest, or in

¹ *Capital and Counties Bank v. Henty*, L. R. 5 C. P. Div. 514; *Dickson v. Wilton*, 1 Fost. & F. 419; *McDougall v. Claridge*, 1 Camp. 267; *Shipley v. Todhunter*, 7 Car. & P. 680; *Spill v. Maule*, L. R. 4 Ex. 232. "Such common interest is generally a pecuniary one, as that of two customers of the same bank, two directors of the same company, two creditors of the same debtor. But it may also be professional, as in the case of two officers in the same corps, or masters in the same school, anxious to preserve the dignity and reputation of the body to which they both belong. In short, it may be any interest arising from the joint exercise of any legal right or privilege, or from the joint performance of any duty imposed or recognized by the law. Thus two executors of the same will, two trustees of the same settlement, have a common interest, though not a pecuniary one, in the management of the trust estate. So the rate-payers of a parish have a com-

mon interest in the selection of fit and proper constables to serve in the parish, their salary being paid out of the rates. So relations by blood or marriage have a common interest in their family concerns. But beyond this there is no privilege. The 'common interest' must be one which the law recognizes and appreciates. No privilege attaches to gossip, however interesting it may be to both speaker and hearers. The law never sanctions mere vulgar curiosity or officious intermeddling in the concerns of others": *Odgers on Libel and Slander*, 234. Thus it has been held that a statement by one member of a church to another, that a third member had a venereal disease, was not privileged: *York v. Johnston*, 116 Mass. 482. A libelous letter written by a minister to an association of ministers, of which he is not a member, concerning one of its members, is not privileged: *Shurtleff v. Parker*, 130 Mass. 293; 39 Am. Rep. 454.

reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.¹ But, as in other cases of qualified privilege, the communication must be such as the occasion warrants, and must be made in good faith to protect the interests of both parties.² Again, the defendant must not make a wider publication than is necessary,³ nor in the presence of strangers.⁴ Confidential communications made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries.⁵

A creditor may comment on his debtor's mode of conducting his business to a surety of the debtor.⁶ A person interested in the proceeds of a sale may give notice to the auctioneer not to part with them to the plaintiff, who ordered the sale, on the ground that he has committed an act of bankruptcy.⁷ The son-in-law of a lady has sufficient interest in whom she marries to justify him in warning her not to marry the plaintiff, if he honestly believes him, however erroneously, to be of bad character.⁸ So the reports of the directors and auditors of a company printed and circulated among the share-holders

¹ *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

² *Purcell v. Sowler*, L. R. 2 C. P. D. 221; *Martin v. Strong*, 5 Ad. & E. 535; *Kine v. Sewell*, 3 Mees. & W. 297. Thus where there are, say, a thousand members of a society, the defendant is not justified in sending his charges to all the members, where there is a managing committee or board of directors to which he might apply. Such a claim of privilege would be too large: *Martin v. Strong*, 5 Ad. & E. 535; *Hoare v. Silverlock*, 12 Q. B. 624.

³ See last note.

⁴ *Kershaw v. Bailey*, 1 Ex. 743; *Scarll v. Dixon*, 4 Fost. & F. 250. A

bank director is not justified in making a communication to a co-director in the public streets, affecting the credit of a merchant, where there is no evidence of such communication being confidential. But he might make such a communication at the board of directors, in relation to one of the customers of the bank: *Sewall v. Catlin*, 3 Wend. 291.

⁵ *Stallings v. Newman*, 26 Ala. 300; 62 Am. Dec. 723.

⁶ *Dunman v. Bigg*, 1 Camp. 267, note.

⁷ *Blackham v. Fugh*, 2 Com. B. 611; 15 Law J. Com. P. 290.

⁸ *Todd v. Hawkins*, 8 Car. & P. 88; 2 Moody & R. 20.

are privileged.¹ A *bona fide* communication between a member of Parliament and his constituents on a matter of political or local interest is privileged; such as a report of any speech of his, circulated privately among his constituents for their information.² An officer at a town election may say to the electors that a person has put two votes in the ballot-box.³ Words spoken of a candidate for office, in the belief of their truth, and for the sole purpose of advising electors of what was believed to be the true character of the candidate, are privileged.⁴

All communications by members of corporate bodies, churches, and other voluntary societies addressed to the body or any official thereof, and stating facts which, if true, it is proper should be thus communicated, are privileged.⁵ Where the official authorities of the church in the discipline of a member act in good faith, and without malice, within the jurisdiction conferred by the laws of the church, they are not liable for language, oral or written, used in such discipline. But it is competent for the plaintiff to prove that in passing the resolution the council was not acting within its lawful authority, in that he was not served with previous citation, which was required by the rules of the church.⁶ The publication by a member of a medical society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result

¹ *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262.

² *Davison v. Duncan*, 7 El. & B. 233; 26 L. J. Q. B. 107; *Wason v. Walter*, L. R. 4 Q. B. 95. *Aliter*, if he published his speech to all the world with the malicious intention of injuring the plaintiff: *R. v. Lord, Abingdon*, 1 Esp. 226; *R. v. Creevey*, 1 Moore & S. 273.

³ *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418.

⁴ *Bays v. Hunt*, 60 Iowa, 251; *State v. Balch*, 31 Kan. 465; *Mott v. Dawson*, 46 Iowa, 533.

⁵ *Jarvis v. Hatheway*, 3 Johns. 180;

3 Am. Dec. 473; *Lucas v. Case*, 9 Bush, 297; *York v. Pease*, 2 Gray, 282; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Streety v. Wood*, 15 Barb. 105; *Farnsworth v. Storrs*, 5 Cush. 412; *Chapman v. Calder*, 14 Pa. St. 365; *O'Donaghue v. McGovern*, 23 Wend. 26; *Haight v. Cornell*, 15 Conn. 74; *Servatius v. Pichel*, 34 Wis. 292; *Landis v. Campbell*, 79 Mo. 433; 49 Am. Rep. 239; *Remington v. Congdon*, 2 Pick. 310; 13 Am. Dec. 431; *McMillan v. Birch*, 1 Binn. 178; 2 Am. Dec. 426; *Kirpatrick v. Eagle Lodge*, 26 Kan. 384; 40 Am. Rep. 316, ⁶ *Over v. Hildebrand*, 92 Ind. 19.

of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged, although it speaks of the expelled member as "the offender," and remarks that "the society has vindicated its action in this case, and its right to act in all parallel cases."¹ To present written charges against a member of a society to another for his signature is privileged.² A letter written by a subscriber to a charity to the committee of management of the charity concerning the conduct of their secretary in the management of the funds of the charity is *prima facie* privileged.³ Any statement made by a director of a company to his fellow-directors as to the conduct and character of their auditor is privileged, though it relates to his conduct with reference to another company of which he was secretary, and not auditor.⁴

If one makes it his business to furnish to others information concerning the character, habits, standing, and responsibility of tradesmen, his business is not privileged, and his statements, if untrue, are libelous.⁵ The information respecting a mercantile firm, communicated by the defendant to a person by whom he was employed for the purpose, and who was directly interested in ascertaining their credit, but afterwards printed by the defendant, and furnished to the merchants having no immediate interest in learning the standing of the firm, is not within the rule of privileged communications.⁶ The reports of the financial condition of merchants,

¹ Barrows v. Bell, 7 Gray, 301; 66 Am. Dec. 479.

² Streety v. Wood, 15 Barb. 105.

³ Maitland v. Bramwell, 2 Fost. & F. 623.

⁴ Harris v. Thompson, 13 Com. B. 333; and see Brooks v. Blanshard, 1 Crompt. & M. 779.

⁵ Com. v. Stacey, 1 Leg. Gaz. 114; Taylor v. Church, 8 N. Y. 452; Ormsby v. Douglass, 37 N. Y. 477; Sunderlin v. Bradstreet, 46 N. Y. 188;

7 Am. Rep. 322; Johnson v. Bradstreet Co., 77 Ga. 172; 4 Am. St. Rep. 77. But *contra*, Erber v. Dun, 4 McCrary, 160; Trussell v. Scarlett, 18 Fed. Rep. 414; Kingsbury v. Bradstreet, 35 Hun, 212; Lock v. Bradstreet, 22 Fed. Rep. 771; State v. Lonsdale, 48 Wis. 348.

⁶ Taylor v. Church, 1 E. D. Smith, 279; Beandsley v. Tappan, 5 Blatchf. 497.

although disseminated in good faith from an intelligence-office by means of semi-annual publications, in large numbers, with weekly corrections, are not privileged communications within the rule; and the publishers are liable for any false report, although honestly made, notwithstanding the libelous matter is in cipher, understood only by the subscribers. Such a communication, to be privileged, must be confined to those having an interest in the information.¹ The publication by a mercantile agency of a notification-sheet, which is sent to its subscribers irrespective of their interest in the plaintiff's standing and credit, is not a privileged communication, and the proprietors are liable for a false report of the plaintiff's financial condition in such publication.² So if a mercantile agency makes misstatements in writing to its customers about the drinking habits and mercantile character of a merchant, saying, for instance, that he is drinking, and failing in business, the company may be liable, if the written statements are seen by the clerks of the subscribers, and perhaps by other persons.³ In England, a circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers is not a privileged communication.⁴

ILLUSTRATIONS. — COMMUNICATIONS HELD PRIVILEGED. — D. was a governor of a public school to which S. supplied meat; defendant told the steward of the school, whose duty it was to examine the meat, that S. had been known to sell bad meat. *Held*, privileged: *Humphreys v. Stilwell*, 2 Fost. & F. 590. Several fictitious orders for goods had been sent in A's name to a tradesman, who thereupon delivered the goods to A. A returned the goods, and being shown the letters ordering them, wrote to the tradesman that in his opinion the letter was in B's handwriting. *Held*, privileged, as both A and the tradesman were interested in discovering the culprit: *Croft v. Stevens*, 7

¹ *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322.

² *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622.

³ *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77.

⁴ *Getting v. Foss*, 3 Car. & P. 160.

Hurl. & N. 570; 31 L. J. Ex. 143. A had a dispute with a water company, which they agreed to refer to "some respectable printer, who should be indifferent between the parties," as arbitrator. The manager of the company nominated the plaintiff, a printer's commercial traveler. A declined to accept him as arbitrator, and when pressed for his reason, wrote a letter to the manager stating that the plaintiff had formerly been in his employment, and had been dismissed for drunkenness. The plaintiff thereupon brought an action on the letter as a libel concerning him in the way of his trade: *Held*, privileged, as both parties were interested in the selection of a proper arbitrator: *Hobbs v. Bryers*, 2 Ir. L. R. 496. A sergeant in a volunteer corps of which plaintiff also was a member represented to the committee by whom the general business of the corps was conducted that plaintiff was an unfit person to be permitted to continue a member of the corps; that he was the executioner of the French king, etc. *Held*, privileged: *Barbaud v. Hookham*, 5 Esp. 109. The auditors of a company reported that the manager's accounts were badly kept, and that there was a large deficiency not accounted for; and at the general meeting this report, with others, was submitted to the share-holders, and the meeting resolved that they should be printed and circulated among the share-holders, which was done. *Held*, that the privilege attaching to such reports was not lost merely by the necessary publication of them to the compositors, etc., in the ordinary course of printing: *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262. A vote of a county association of Congregational ministers reciting that charges of untruthfulness, etc., had been made against one of their number, and withdrawing fellowship with him until a certain day, when he was to appear and vindicate himself, or be dismissed from the association without papers, was by its order published in two Congregational newspapers. *Held*, privileged: *Shurtleff v. Stevens*, 51 Vt. 501; 31 Am. Rep. 698. Plaintiff was treasurer of a certain city, and candidate for re-election. The defendants, being residents and taxpayers in such city, published a communication in a paper published in such city, of which they were proprietors and editors, charging that the plaintiff had, as appeared by certain official reports, failed to account for city funds in his hands, and that (as the plaintiff claimed) he had embezzled a portion of such funds. *Held*, privileged: *Marks v. Baker*, 28 Minn. 162. Defendant's wife, a stockholder in a street-railway company, informed her husband that she had heard persons boast that a car of the company driven by the plaintiff was "a good dead-head car" for them, and the defendant informed the foreman of the company, who thereupon without investigation or notice discharged the plain-

tiff. *Held*, privileged: *Haney v. Trost*, 34 La. Ann. 1146; 44 Am. Rep. 461. Defendants, having been defrauded of a large amount of goods by persons with whom they had reason to and did believe plaintiff to be associated, prepared and signed a paper, stating that they, with others, had been "robbed and swindled" by plaintiff and others, and agreeing to bear proportionately the expenses of a criminal prosecution of plaintiff and such others. The paper was exhibited to an agent of one of the defrauded persons for signature. *Held*, privileged: *Klinek v. Colby*, 46 N. Y. 427; 7 Am. Rep. 360. In proceedings by R., as the next friend of a female infant, to remove the guardian of such infant, the petition alleged as a reason for such removal that the guardian kept in his family B., a girl whose "reputation is ruined, and she is now an example of shame and prostitution." *Held*, conditionally privileged, although B. was not a party to the record, and that to render R. liable to B. for libel, malice must be shown: *Ruohs v. Backer*, 6 Heisk. 395; 19 Am. Rep. 598. Plaintiff was a candidate for re-election to the office of judge. Defendant was president of a committee of citizens interested in securing the election of proper persons to office. A. wrote a letter to defendant, in effect charging plaintiff with having made possible a large theft by his charge to the jury in a certain case, which, in fact, was not tried in his court at all. Defendant, who might have ascertained this, read the letter to the committee, several newspaper men being present, who gave the accusation wide notoriety. He was not actuated by malice. *Held*, that the communication was privileged: *Briggs v. Garrett*, 111 Pa. St. 404; 56 Am. Rep. 274.¹

¹ Three judges dissented, holding that the judge should have left the case to the jury. In the court below (whose judgment was affirmed) an able opinion was delivered by Biddle, J., who said: "In considering the present case, then, the fact must never be lost sight of, that the plaintiff here was a candidate for public office. He had been nominated by one political party, his opponent by another. The votes of their fellow-citizens were solicited, and an active and earnest canvass made to secure them. At this time it seems that a number of taxpayers and voters were in the habit of meeting together to discuss the merits of the various candidates, soliciting their suffrages, and on one of these occasions the communication here complained of was received by the defendant, who happened to be their chairman, and in the ordinary course

of business it was read aloud by his direction. It is contended by the plaintiff that this was not a privileged communication, and that the same law should therefore be applied to the defendant as if he had aspersed in the newspaper the character of a wife or daughter of a private citizen; that the occasion gave him no more protection. To hold this in a country where persons are elected by popular suffrage, and in a case where a man puts his character in issue, so far at least as it concerns his fitness for office, would be retrograding to the days when prosecution for libel were the favored instruments of tyranny. It seems to us that if ever a comment is privileged, it is where the person upon whom it is made invites it. It is a mistake to suppose that this doctrine leaves a candidate naked to his enemies. It puts upon him the proof of malice, which

ILLUSTRATIONS (CONTINUED). — COMMUNICATIONS HELD NOT PRIVILEGED. — A share-holder in a company summoned a meeting of share-holders, and also invited reporters for the press to attend. Charges were then by him made against one of the directors for his conduct of the affairs of the company. *Held*, not privileged, because persons not share-holders were present: *Parsons v. Surgey*, 4 Fost. & F. 247. Plaintiff and defendant were jointly interested in property in Scotland, to the manager of which defendant wrote a letter principally about the property and the conduct of the plaintiff with reference thereto, but also containing a charge against the plaintiff with reference to his conduct to his mother and aunt. *Held*, that though the part of the letter about the defendant's conduct as to the property might be confidential and privileged, such privilege could not extend to the part of the letter about the plaintiff's conduct to his mother and aunt: *Warren v. Warren*, 1 Crompt. M. & R. 250; 4 Tyrw. 850. The defendant, the tenant of a farm, required some repairs to be done at his house; the landlord's agent sent up two workmen, the plaintiff and T. They made a bad job of it, the plaintiff got drunk while on the premises, and the defendant was convinced from what he heard that the plaintiff had broken open his cellar-door, and drunk his cider. Two days afterwards, the defendant met the plaintiff and T. together and charged the plaintiff with breaking open the cellar-door, getting drunk, and spoiling the job. He repeated this charge later in the same day to T. alone, in the absence of the plaintiff, and also to the landlord's agent. *Held*, that the communication to the landlord's agent was clearly privileged, as both were interested in the repairs being properly done; that the statement made to the plaintiff in T.'s presence was also privileged, if not malicious; but that the repetition of the statement to T., in the absence of the plaintiff, was unauthorized and officious, and therefore not protected, although made in the belief of its truth: *Toogood v. Spyring*, 1 Crompt. M. & R. 181; 4 Tyrw. 582. Defendant made an affidavit that plaintiff, who had testified on a trial before a Masonic lodge, was not to

is not so difficult to establish as is supposed. If the charge is shown to have been made wantonly, or without proper occasion or just motive or probable cause, any of those being shown would supply the malice that is wanting to make the privileged communication libelous. . . . We think, then, as this was a communication made by one voter to other voters, each having a voice in the election of the candidate, about a matter of the deepest interest to the public, and

about which they had a right to be informed, and was made in relation to a person seeking a public office, who had thus by offering himself as a candidate challenged scrutiny, the judge who tried the case was right in holding the occasion one entitled to the highest privilege, and that as the plaintiff's own case did not show malice, but most clearly rebutted any such implication, the nonsuit was properly granted."

to speak as well as to act in his own defense, under certain circumstances. It is essential, however, that the occasion justified the words, and that the speaker or writer went no further than was necessary to protect himself.¹ Thus the occupier of a house may complain to the landlord or his agent of the workmen he has sent to repair the house.² A customer may call and complain to a tradesman of the goods he supplies, and the manner in which he conducts his business.³ The owner of a building which has been set on fire may caution persons in the building against particular persons suspected of being the incendiary,⁴ or communicate to his family his suspicions.⁵ The directors of a society for promoting female medical education may, in a published report, caution the public against trusting a person who had formerly been employed to obtain and collect subscriptions on

¹ *Cooke v. Wildes*, 5 El. & B. 328; *Huntley v. Ward*, 1 Fost. & F. 552. In *Billings v. Fairbanks*, 139 Mass. 66, "the defendant, claiming to have lost money, accused the plaintiff, who was in his employ, with stealing it. Upon this accusation being made, the plaintiff, through his wife, informed one Leonard Foster, with whom he had lived for many years from his boyhood up, of the accusation, and sought his advice. Foster went to the defendant and had an interview with him, in which the defendant informed him of the grounds upon which he made the accusation. Upon this application made to him by the plaintiff, Foster had such an interest in the subject and duty to perform that he was entitled to have the interview with the defendant, and the statements made by the defendant upon the subject to which the interview related were privileged. During this interview the plaintiff came in. The plaintiff asked the defendant to settle with him what he owed him, to which the defendant replied that he hired him for a year. The plaintiff then said: 'You do not want a man who steals your money, and I do not want to work for a man who charges me with it.' To which the defendant replied,

'I know you took the money, and there is another person who knows it, also.' It is upon these words so spoken that the plaintiff relies as the substantive slander for which he brings this action. We are of opinion that these words were, under the circumstances, privileged, and the jury should have been so instructed. It is of no importance whether the interview between Foster and the defendant had ended or not. If Foster had not been present, the words were clearly privileged. The plaintiff commenced the conversation, and introduced the subject of the charge of larceny made against him. The words used by the defendant were spoken in this conversation, and the mere fact that the words were spoken in presence of Foster, who, as the friend of the plaintiff, had been investigating the charge and had been fully informed of all the facts and circumstances, did not defeat the privilege."

² *Toogood v. Spyring*, 1 Crompt. M. & R. 181; 4 Tyrw. 582; *Kine v. Sewell*, 3 Mees. & W. 297.

³ *Oddy v. Lord George Paulet*, 4 Fost. & F. 1009; *Crisp v. Gill*, 29 L. T. 82.

⁴ *Lawler v. Earle*, 5 Allen, 22.

⁵ *Campbell v. Bannister*, 79 Ky. 205.

their behalf, but has since been dismissed, if the caution is given in good faith, and is required for the protection of the corporation and the public.¹ An advertisement warning the public against the negotiations of notes, etc., alleged to have been stolen, is privileged.² So one who is attacked in print or by word of mouth may retort in like manner.³ In *Koenig v. Ritchie*,⁴ the plaintiff was a policyholder in an insurance company, and published a pamphlet accusing the directors of that company of fraud. The directors published a pamphlet in reply, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit he had instituted he had sworn in support of those charges in opposition to his own handwriting. Cockburn, C. J., held the directors' pamphlet *prima facie* privileged, saying to the jury: "If you are of opinion that it was published *bona fide* for the purpose of the defense of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff,—if you are of that opinion, and think that the publication did not go beyond the occasion, then you ought to find for the defendants on the general issue."

But the fact that an article alleged to be libelous was published in explanation of and in reply to a false article published by plaintiff concerning defendants cannot be pleaded in justification.⁵ So the fact that plaintiff owed money to defendant before her marriage, which she refuses to pay, exhibiting great ingratitude, does not render a defamatory letter concerning her conduct before marriage, written by defendant to her husband, a privileged communication, though the object was to compel the

¹ *Gassett v. Gilbert*, 6 Gray, 94.

⁴ 3 Fost. & F. 413.

² *Com. v. Featherston*, 9 Phila. 594.

⁵ *Stewart v. Minnesota Tribune Co.*,

³ *O'Donoghue v. Hussey*, I. R. 5 C. 40 Minn. 101.

husband or the wife to pay the debt.¹ In an advertisement notifying the public not to harbor or trust the advertiser's wife on his account, defamatory words in regard to the wife are not privileged.²

ILLUSTRATIONS.—The defendant, the manager of a hotel, was informed by a guest that the plaintiff, a domestic employed in the hotel, had stolen a diamond pin from his room, whereupon the defendant sent for the plaintiff, and told her what the guest had said, and, in the presence of the chambermaid, charged the plaintiff with the offense. *Held*, privileged: *Keane v. Sprague*, 19 Cent. L. J. 315.³ A baker published in a newspaper that the plaintiff, one of his drivers, had "left my employ, and taken upon himself the privilege of collecting my bills," etc. *Held*, privileged: *Hatch v. Lane*, 105 Mass. 394. Several persons who had been defrauded of a large quantity of goods by false representations, having probable cause to believe that the transaction was a criminal offense, and that the plaintiff was a party to it, signed a paper, in which they agreed to bear equally the expenses of prosecuting plaintiff and others criminally, stating that they had been "robbed and swindled" by plaintiff and others. *Held*, privileged: *Klinch v. Colby*, 46 N. Y. 427; 7 Am. Rep. 360. A publication criticising plaintiff, a teacher, charged her with over-devotion to details and with an impatient and a vacillating disposition. The criticism spoke favorably of her skill. Defendant was superintendent of schools, and had been attacked by plaintiff, who lost her situation through defendant, and he allowed the publication to be made. *Held*, that an action for libel could not be maintained: *O'Connor v. Sill*, 60 Mich. 175. A trader employed an auctioneer to sell off his goods, and otherwise so conducted himself that his creditors concluded that he had committed an act of bankruptcy. One of them, the defendant, sent the auctioneer a notice not to pay over the proceeds of the sale to the trader, "he having committed an act of bankruptcy." *Held*, privileged, being made in defense of defendant's own interests: *Blackham v. Pugh*, 2 Com. B. 611; 15 L. J. Com. P. 290. Defendant had dismissed plaintiff from

¹ *Beals v. Thompson*, Mass. 1889.

² *Smith v. Smith*, Mich. 1889.

³ "The communication had its origin in the confidential relation existing between the parties, and emanated from one whom the defendant, under the circumstances, had the right to believe. Privileged communications comprehend all statements made *bona fide* in the performance of a duty or with a

fair and reasonable purpose of protecting the interest of the person making them. The communication made by the defendant comes within the protection of this rule. What the defendant said was in performance of a duty he owed, not only to the guest, but to the good reputation and management of the hotel under his charge."

his service on suspicion of theft, and, upon plaintiff coming for his wages, called in two other of his servants, and, addressing them in the presence of the plaintiff, said: "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him." *Held*, privileged: *Somerville v. Hawkins*, 10 Com. B. 583; 20 L. J. Com. P. 131. W., having lost certain bills of exchange, published a handbill offering a reward for their recovery, and adding that he believed that they had been embezzled by his clerk. The clerk was still in his office. *Held*, that the latter part of the handbill was not privileged: *Finden v. Westlake*, Moody & M. 461. Defendant claimed rent of plaintiff; plaintiff's agent told defendant that plaintiff denied his liability; defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "This attempt to defraud me of the produce of the land is as mean as it is dishonest." *Held*, not privileged: *Tuson v. Evans*, 12 Ad. & E. 733.¹ Defendant was a candidate for Parliament. Shortly before the election, the Farmers' Association published in the Freeman's Journal an address to the constituency describing the defendant as "a true type of a bad Irish landlord, — the scourge of the country," and charging him with various acts of tyranny and oppression towards his tenants, and especially towards the plaintiff, one of his former tenants. The defendant thereupon published, also in Freeman's Journal, an address to the constituency, answering the charges thus brought against him, and in so doing necessarily libeled plaintiff. *Held*, that the address, being an answer to an attack, was privileged: *Dwyer v. Esmonde*, 2 Ir. L. R. 243, reversing Ir. R. C. L. 542. Plaintiff, a barrister, attacked a bishop before a legislature in an argument against a bill, imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinua-

¹ The court saying: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his entire silence might have been construed into an acquiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language

bona fide, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion: to characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary."

tions, and sent it to the newspapers for publication. *Held*, that the bishop was justified in sending the charge to the newspaper, for an attack made in public required a public answer: *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495. A expressed an opinion, founded on the statement of others, that B had maliciously killed his horse, and was arraigned therefor by B before the church. In self-defense, A produced the certificates of the individuals upon whose authority he made the statements. *Held*, privileged: *Dunn v. Winters*, 2 Humph. 512. At a vestry-meeting called to elect fresh overseers, plaintiff accused defendant, one of the outgoing overseers, of neglecting the interests of the vestry, and not collecting the rates; the defendant retorted that the plaintiff had been bribed by a railway company. *Held*, that the retort was a mere *tu quoque*, in no way connected with the charge made against him by the plaintiff, and was therefore not privileged, for not having been made in self-defense: *Senior v. Medland*, 4 Jur., N. S., 1039. A wrote to B that C, by lying, had got possession of certain goods, and that if B would withhold from his indebtedness to C the amount claimed by A, A would not claim a lien on the goods. C was B's servant, and B claimed the goods. *Held*, not privileged: *Over v. Schiffing*, 102 Ind. 191.

§ 1298. **Reports of Judicial Proceedings.** — The publication of reports of proceedings in the courts is privileged;¹ for "the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings."² The rule is the same whether the report is published by a private person in a pamphlet or by a newspaper.³ The privilege extends to proceedings which take place publicly before a magistrate on the preliminary investigation of a criminal charge,⁴ to proceedings held in jail before a registrar in bankruptcy, under a bankruptcy act, upon an examination of a debtor in custody,⁵ and to proceedings in the nature of trials in

¹ *Usill v. Hales*, L. R. 3 Com. P. Div. 319; *Ackerman v. Jones*, 37 N. Y. Sup. Ct. 42.

² *R. v. Wright*, 8 Term Rep. 298; *Storey v. Wallace*, 60 Ill. 51; *Saunders v. Baxter*, 6 Heisk. 369; *Torrey v. Field*, 10 Vt. 353; *Cinn. Gazette Co.*

v. Timberlake, 10 Ohio St. 548; 78 Am. Dec. 285.

³ *Cooley on Torts*, 219; *Odgers on Libel and Slander*, 251.

⁴ *Lewis v. Levy*, El. B. & E. 537.

⁵ *Ryalls v. Leader*, L. R. 1 Ex. 296.

voluntary associations, as, for example, a medical society.¹

But where the hearing is merely *ex parte*, the privilege does not attach, at least beyond the publishing of the fact that the charge has been made.² The publication of the contents of a petition for the disbarment of an attorney filed in vacation, and not presented or docketed, is not privileged.³ No privilege attaches to the report of

¹ *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479.

² *Cooley on Torts*, 218; *Huff v. Bennett*, 4 Sand. 120; *Stanley v. Webb*, 4 Sand. 21; *Matthews v. Beach*, 5 Sand. 256; *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33; *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198; *Cinn. Gazette Co. v. Timberlake*, 10 Ohio St. 548; 78 Am. Dec. 285. *Contra*, *McBee v. Fulton*, 46 Md. 403; 28 Am. Rep. 465. In *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377, the court say: "Where a court or public magistrate is sitting, publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and *ex parte* hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the *ex parte* nature of the proceedings may not destroy the privilege, to prevent such a result there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action." In England, in the case of *Lewis v. Levy*, El. B. & E. 537, it was held that a report of a preliminary investigation before a magistrate was privileged, if the result was that the summons was dismissed and the person accused discharged. In *Duncan v. Thwaites*, 3 Barn. & C. 556, 5 Dowl. & R. 447, it was held that such a report was unprivileged, if the accused be ultimately sent to take his trial before a jury. In *Usill v. Hales*, 3 Com. P. Div. 319, the magistrate on an *ex parte* application decided that he had no jurisdiction, and declined to issue a summons. The court held

that this was a judicial proceeding, and that a report of it published by the defendants was privileged. In delivering the judgment of the court, Coleridge, C. J., said: "It was attempted to distinguish this case, and to bring it within an alleged qualification of the rule by showing this to have been an *ex parte* proceeding before a magistrate. Sixty or seventy years ago this argument might have prevailed. From the cases cited in *Starkie on Libel*, 4th ed., pp. 167 et seq., the rule seems to have been established that an *ex parte* proceeding was not privileged, on account of the hardship which would otherwise ensue to the party libeled, and this was adopted in *Duncan v. Thwaites*. But since that time the courts have come to conclusions irreconcilable with those cases."

³ *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318, the court saying: "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge

unsworn statements made by a by-stander at an inquest,¹ and it has been held that the publication of a slander uttered by a murderer at the time of his execution is not privileged, either under the statute law of New York or under the common law. The statute of New York relates only to statements made in judicial, legislative or administrative bodies, in the execution of some public duty.² The privilege does not attach where the subject-matter of the trial is indecent, obscene, or blasphemous,³ or where the court has prohibited the publication.⁴

The report must be accurate; it need not be *verbatim*, but where it is abridged or condensed, it must be correct; it may not omit what is favorable to the plaintiff and contain what is unfavorable. In other words, it must be substantially what took place.⁵ A newspaper report of a criminal trial must be a fair and impartial report of what took place with reference to its effects on the defendant's character. If a *verbatim* report would have the same effect on his character as the abridged one, the abridged report is, so far as the defendant is concerned, a fair and impartial one. Whether it is such a report or not is a question for the jury.⁶ And the publication of judicial proceedings is not privileged to the extent of protecting statements made in connection therewith, but drawn from other sources, and without stating the judicial con-

of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege further than we feel prepared to carry it, to say that by the easy means of entitling and filing it in a cause a sufficient foundation may be laid for scattering any libel broadcast with impunity: See *Sanford v. Bennett*, 20 N. Y. 20, 27; *Lewis v. Levy*, El. B. & E. 537; *Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377."

¹ *Lynam v. Gowing*, 6 Ir. L. R. 259.

² *Sanford v. Bennett*, 24 N. Y. 20.

³ I. e., the general publication of such matters. Reports of such trials in legal or medical journals or books, accessible only to and for the benefit of the respective professions, would stand on a different footing.

⁴ This power, once frequently exercised in England, is said now to be rarely exercised: *Brook v. Evans*, 29 L. J. Ch. 616; *Lewis v. Levy*, El. B. & E. 560.

⁵ *Andrews v. Chapman*, 3 Car. & K. 287; *Duncan v. Thwaites*, 3 Barn. & C. 580; *Saunders v. Baxter*, 6 Heisk. 369; *Salisbury v. Union Advertiser Co.*, 45 Hun, 120.

⁶ *Boogher v. Knapp*, 97 Mo. 122.

clusion.¹ A report is not privileged which does not give the evidence, but merely sets out the circumstances "as stated by the counsel" for one party.² Still less will it be privileged if after so stating the case the only account given of the evidence is that the witnesses "proved all that had been stated by the counsel for the prosecution."³ Nor where it is accompanied by sensational headings not justified by the evidence,⁴ or by sensational or defamatory comments upon the characters of those in relation to whom the proceedings are taken.⁵ And it must be strictly confined to the actual proceedings. The report must not contain comments of the writer insinuating bad motives, or that the plaintiff committed perjury, or the like.⁶ So a statement made upon the authority of a newspaper, and not purporting to be a report of proceedings of a court, is not privileged, and the responsibility therefor cannot be evaded by an offer of proof that the libel was in fact matter of evidence.⁷ The publication of a statement made by a justice of what had been said by persons applying to him for a warrant, which statements do not appear in any affidavit, nor were made as part of a hearing, are not privileged.⁸

As the privilege is only qualified, the defendant is liable, though the report be fair and accurate, if it was nevertheless maliciously published,⁹ or if it contain intrinsic evidence that it was not published with good motives or for justifiable ends.¹⁰ In the case of a reporter or one connected with the paper, this will be hard to

¹ *Bathrick v. Detroit Post and Publishing Co.*, 50 Mich. 629.

² *Saunders v. Mills*, 6 Bing. 213; 3 Moore & P. 520; *Woodgate v. Ridout*, 4 Fost. & F. 202.

³ *Lewis v. Walter*, 4 B. & Ald. 605.

⁴ *Lewis v. Levy*, El. B. & E. 537; *Boydell v. Jones*, 4 Mees. & W. 446; *Clement v. Lewis*, 3 Brod. & B. 297.

⁵ *Scripps v. Reilly*, 38 Mich. 10.

⁶ *Andrews v. Chapman*, 3 Car. & K. 288; *Stiles v. Nokes*, 7 East, 493;

Pittock v. O'Neill, 63 Pa. St. 253; 3 Am. Rep. 544; *McBee v. Fulton*, 47 Md. 403; 28 Am. Rep. 465; *Thomas v. Croswell*, 7 Johns. 264; 5 Am. Dec. 269; *Stanley v. Webb*, 4 Sand. 21; *Edsall v. Brooks*, 26 How. Pr. 426.

⁷ *Storey v. Wallace*, 60 Ill. 51.

⁸ *McDermott v. Evening Journal Ass'n*, 43 N. J. L. 488.

⁹ *Stevens v. Sampson*, L. R. 5 Ex. Div. 53.

¹⁰ *Saunders v. Baxter*, 6 Heisk. 369.

prove. He would be acting only in the line of his duty when making the report to the paper. But a mere volunteer will be liable in such a case, malice being proved.¹ The question whether it is a fair report is one for the jury.²

ILLUSTRATIONS. — The report of a trial set out the speech for the counsel for the prosecution, and then added: "The first witness was R. P., who proved all that had been stated by the counsel for the prosecution," but owing to the absence of a piece of formal evidence in no way bearing on the merits of the case, "the jury, under the direction of the learned judge, were obliged to give a verdict of acquittal, to the great regret of a crowded court, on whom the statement and the evidence, so far as it went, made a strong impression of their guilt." *Held*, not privileged: *Lewis v. Walter*, 4 Barn. & Ald. 605; *Roberts v. Brown*, 10 Bing. 519; 4 Moore & S. 407. The captain of a vessel was charged before a magistrate with an indecent assault upon a lady on board his own ship. A newspaper published a report of the case, interspersed with comments which assumed the guilt of the captain, commended the conduct of the lady, and generally tended to inflame the minds of the public violently against the accused. *Held*, not privileged: *R. v. Fisher*, 2 Camp. 563. On an examination into the sufficiency of sureties on an election petition, affidavits were put in to show that one of them (the plaintiff) was embarrassed in his affairs, and an insufficient surety. A newspaper report of the examination proceeded to ask why the plaintiff, being wholly unconnected with the borough, should take so much trouble about the matter. "There can be but one answer to these very natural and reasonable queries—he is hired for the occasion." *Held*, not privileged: *Cooper v. Lawson*, 8 Ad. & E. 746. A petition for divorce was filed in the circuit court against plaintiff, charging her with adultery. Defendant, before the petition was brought be-

¹ *Stevens v. Sampson*, L. R. 5 Ex. Div. 53.

² *Risk Allah Bey v. Whitehurst*, 18 L. T. 615; *Street v. L. V. Soc.*, 22 Week. Rep. 553. In an English case the report of a criminal trial gave the speech for the prosecution, a brief *résumé* of the speech of the prisoner's counsel, who called no witnesses, and the whole of the lord chief baron's summing up *in extenso*; but it did not give the evidence, except in so far as it was detailed in the judge's summing up; Lord

Coleridge, C. J., held the report necessarily unfair, because incomplete, and refused to leave the question of fairness to the jury. But the court of appeal held that he was wrong in so doing; that it is sufficient to publish a fair abstract of the trial, and that the judge's summing up was presumably such an abstract; that the question of fairness must be left to the jury, and that therefore there must be a new trial: *Milissich v. Lloyds*, 46 L. J. Com. P. 404; 13 Cox C. C. 575.

fore the court for judicial action, published in its newspaper the substance of the petition without defamatory comments. *Held*, that the publication was not privileged: *Barber v. St. Louis Dispatch*, 3 Mo. App. 377. A newspaper article contained a statement, with comments, of judicial proceedings instigated by J. to obtain a divorce from his wife, on the ground of her adultery with plaintiff; at the trial the judge charged the jury that "taking the whole article together, the petition for divorce, and the comments upon it, there can be no doubt that it is libelous, and grossly so." *Held*, correct: *Pittock v. O'Neill*, 63 Pa. St. 253; 3 Am. Rep. 544. Defendant was cross-examined concerning a certain newspaper publication which the plaintiff's counsel afterwards incorporated into his printed brief. The publication on final hearing was declared incompetent as evidence, and the plaintiff and his counsel were sued for libel, the publication containing libelous matter concerning the defendant. There was nothing to show bad faith. *Held*, that the publication was privileged: *Stewart v. Hill*, 83 Ky. 375.

§ 1299. **Legislative Proceedings.**—Every fair and accurate report of any proceeding in a legislative body of any kind, or in any committee thereof, is privileged, even though it contain matter defamatory of an individual; the rule being the same as in the case of judicial proceedings.¹ Thus a newspaper may report the proceedings of a public meeting of a town council, and remarks made by members of the council concerning public matters, and may comment thereupon, without being chargeable with libeling the mayor, whose public action is unfavorably criticised.² But the publication of proceedings before a joint committee appointed by the legislature to sit after its adjournment to obtain evidence, consisting in part of statements by witnesses under oath, to guide the state's counsel in instituting criminal prosecutions against the perpetrators of land frauds and forgeries, has been held not privileged.³

¹ *Terry v. Fellows*, 21 La. Ann. 375; *Com. v. Blanding*, 3 Pick. 304; 15 Am. Dec. 214.

² *Wallis v. Bazet*, 34 La. Ann. 131.

³ *Belo v. Wren*, 63 Tex. 686.

§ 1300. **Other Reports — No Privilege.** — “No other reports are privileged. If any one publishes an account of the proceedings of any meeting of a town council,¹ board of guardians, or vestry, of the share-holders of any company, of the subscribers to any charity, or of any public meeting, political or otherwise, and such account contains expressions defamatory of the plaintiff, the fact that it is a fair and accurate report of what actually occurred will not avail as a defense, though it may be urged in mitigation of damages. By printing and publishing the statements of the various speakers he has made them his own, and must either justify and prove them strictly true, or he may rely upon their being fair and *bona fide* comments on a matter of public interest.”² The publication of the words of a murderer on the gallows is not privileged.³

§ 1301. **Malice — Proof of.** — As said in a former section, malice is presumed from oral as well as from written defamation, and it is not necessary to prove it⁴ in an ordinary action for defamatory words written or spoken.⁵ But where the words are shown to have been uttered or

¹ But as to this, see *ante*, § 1283.

² Odgers on Libel and Slander. See *ante*, § 1230.

³ Sanford v. Bennett, 24 N. Y. 20.

⁴ Byam v. Collins, 111 N. Y. 143; 7 Am. St. Rep. 726.

⁵ The law implies, if it is libelous, and not privileged, that it was malicious: Lawson v. Hicks, 38 Ala. 279; 81 Am. Dec. 49; Lick v. Owen, 47 Cal. 252; Mousler v. Harding, 33 Ind. 176; 5 Am. Rep. 195; Jarnigan v. Fleming, 43 Miss. 710; 5 Am. Rep. 514; Sanderson v. Caldwell, 45 N. Y. 398; 6 Am. Rep. 105; Estes v. Antrobus, 1 Mo. 197; 13 Am. Dec. 496; Gilman v. Lowell, 8 Wend. 573; 24 Am. Dec. 96; Obaugh v. Finn, 4 Ark. 110; 37 Am. Dec. 773; Byrket v. Monohon, 7 Blackf. 83; 41 Am. Dec. 212; Hatch v. Potter, 2 Gilm. 725; 43 Am. Dec. 88; Tresca v. Maddox, 11 La. Ann. 206;

66 Am. Dec. 198; Hosley v. Brooks, 20 Ill. 115; 71 Am. Dec. 252; Smart v. Blanchard, 42 N. H. 137; Littlejohn v. Greely, 13 Abb. Pr. 41; Usher v. Severance, 20 Me. 9; 37 Am. Dec. 33; Hudson v. Garner, 22 Mo. 423; Fry v. Bennett, 5 Sand. 54; Gaul v. Fleming, 10 Ind. 253; Johnson v. Robertson, 8 Port. 486; Pennington v. Meeks, 46 Mo. 217; Zuckerman v. Sonneschein, 62 Ill. 115; Humphries v. Parker, 52 Me. 502; True v. Plumley, 36 Me. 466; Nott v. Stoddard, 38 Vt. 25; 88 Am. Dec. 633. Where a libel is published in a newspaper conducted by a partnership, the malice of one partner is imputable to his copartners, although a statute exacts proof of actual malice: Lothrop v. Adams, 133 Mass. 471; 43 Am. Rep. 528.

published on an occasion or under circumstances of a qualified privilege, the question of malice becomes relevant, and if proved to exist, takes away the privilege.' And malice in this connection means any wrongful motive which induces the defendant to defame the plaintiff.²

¹ *Eviston v. Cramer*, 47 Wis. 659; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 246, Brett, L. J., saying: "When there has been a writing or a speaking of defamatory matter, and the judge has held — and it is for him to decide the question — that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion, not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious; that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. . . . The judgment of Bayley, J., in *Bromage v. Prosser*, 4 Barn. & C. 255, treats of malice in law, and no doubt where the word 'maliciously'

is used in a pleading, it means intentionally, willfully. It has been decided that if the word 'maliciously' is omitted in a declaration for libel, and the words 'wrongfully' or 'falsely' substituted, it is sufficient, the reason being that the word 'maliciously,' as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind."

² *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198. In *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62, the court say: "The distinction between malice in law and malice in fact has not always been regarded sufficiently in judicial opinions, and some apparent conflict has resulted. Nor does the term 'malice' always have the same signification in law. In actions for malicious prosecution, the word has a meaning and force different from what it has in actions on the case for slander: *Mitchell v. Jenkins*, 5 Barn. & Adol. 588. As understood in this latter class of actions, malice in fact implies a desire and an intention to injure. But malice in law is not necessarily inconsistent with an honest or even a laudable purpose. If one makes a false accusation against another without knowing it to be false, but with no sufficient cause or excuse, it is legally malicious: *Bromage v. Prosser*, 4 Barn. & C. 247. If he makes such an accusation, knowing it to be false, it is actually malicious. The former is a presumption of law from certain facts proved. Whether the latter existed in any given case is a question of fact for the jury. Legal malice alone is sufficient to support an action for slanderous words. And if the words are actionable in themselves, and are not privileged, the speaking of them is sufficient evidence of this kind of malice. The law implies such malice from the uttering of such words, and no other evidence of malice is neces-

The *onus* of proving malice is then on the plaintiff,¹ and that the charge is false is not sufficient evidence of it.² But malice may be inferred from false statements exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them.³

To prove malice the plaintiff may show, — ill feeling and hostility existing between the parties;⁴ former or subsequent slanders or libels on him by the defendant;⁵ that the defendant has subsequently reiterated the same or similar defamatory words, even since the action was brought;⁶ that the defendant has attempted to justify it, but has failed;⁷ that defendant took depositions with the view to prove the truth of the libel, and then abandoned this defense at the trial;⁸ that plaintiff and defendant are rivals in trade, or that they competed together for some post, and plaintiff succeeded, and that then the defendant,

sary. But the plaintiff may, if he chooses, prove actual malice also to enhance the damages: *True v. Plumley*, 36 Me. 466. If the defendant shows that the words were spoken as privileged communications, so that there was no legal malice, it is a full justification upon which he is entitled to a verdict in his favor. But proof that there was no actual malice goes only in mitigation of damages."

¹ *Taylor v. Hawkins*, 16 Q. B. 132; *Cooke v. Wildse*, 5 El. & B. 340; *Clark v. Molyneux*, L. R. 3 Q. B. Div. 237; *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

² *Lewis v. Chapman*, 16 N. Y. 369; *Fowles v. Bowen*, 30 N. Y. 20; *Caulfield v. Whitworth*, 16 Week. Rep. 936.

³ *Gott v. Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322.

⁴ *Blagg v. Sturt*, 10 Q. B. 904.

⁵ *Larrabee v. Minn. Tribune Co.*, 36 Minn. 141; *Barrett v. Long*, 3 H. L. Cas. 395; *Prune v. Eastwood*, 45 Iowa, 640; *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75; *Letton v. Young*, 2 Met. (Ky.) 558; *Behee v. R. Co.*, 71 Tex. 424; *Stearns v. Cox*, 17 Ohio, 590; *Bar-*

tow v. Brands, 15 N. J. L. 248; *Brittain v. Allen*, 2 Dev. 120; *Carter v. McDowell*, Wright, 100; *Elliott v. Boyles*, 31 Pa. St. 65; *Miller v. Kerr*, 2 McCord, 285; 13 Am. Dec. 722; *Halley v. Gregg*, 74 Iowa, 563. Though such previous libels may be barred by the statute of limitations: *Evening Journal Association v. McDermott*, 44 N. J. L. 430; 43 Am. Rep. 392.

⁶ *Chubb v. Westley*, 6 Car. & P. 436; *Pearson v. Lemaitre*, 5 Mees. & W. 700; *Delegall v. Highley*, 8 Car. & P. 444; *Macleod v. Wakley*, 3 Car. & P. 311; *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75; *Miller v. Kerr*, 2 McCord, 285; 13 Am. Dec. 722; *McIntyre v. Young*, 6 Blackf. 496; 39 Am. Dec. 443; *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489; *Parmer v. Anderson*, 33 Ala. 78; *Williams v. Miner*, 18 Conn. 464; *Smith v. Wyman*, 16 Me. 13; *Duvall v. Griffith*, 2 Har. & G. 30; *Bodwell v. Swan*, 3 Pick. 376; *Baldwin v. Soule*, 6 Gray, 321; *Thompson v. Bowers*, 1 Doug (Mich.) 321.

⁷ *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75. See *ante*, Justification.

⁸ *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228.

being disappointed, wrote the libel;¹ that the words used are grossly exaggerated in describing the plaintiff's conduct;² that the communication was made unnecessarily public, as in the hearing of third persons, etc., or to persons who had no interest in it;³ that the defendant knew the charge was false;⁴ that it was made wantonly, without the defendant's knowing or caring whether it was true or false;⁵ that defendant caused the libel to be industriously circulated;⁶ that defendant subsequently refused to retract the slanderous words;⁷ that he refused to publish a card expressing a belief in plaintiff's innocence, save as an advertisement.⁸ Where a master has given a servant a bad character, the circumstances under which they parted, any expressions of ill-will uttered by the master then or subsequently, the fact that the master never complained of the plaintiff's misconduct whilst she was in his service, or when dismissing her would not specify the reason for her dismissal, and give her no opportunity of defending herself, together with the circumstances under which the character was given, and its exaggerated language, are each and all evidence of malice.⁹

But on the question of malice, evidence is not admissible that the defendant has libeled or threatened to libel other persons.¹⁰ And two articles cannot be coupled to ascertain if one of them is libelous or not, the articles not being published in the same paper.¹¹ In an action of slander for charging plaintiff with the commission of a

Warman v. Hine, 1 Jur. 820; *Smith v. Mathews*, 1 Moody & R. 151.

² *Odgers on Libel and Slander*, 277.

³ *Odgers on Libel and Slander*, 277.

⁴ *Odgers on Libel and Slander*, 278.

⁵ *Clark v. Molyneux*, L. R. 3 Q. B. Div. 247.

⁶ *Gathercole v. Miall*, 15 Mees. & W. 319.

⁷ *Klewin v. Bauman*, 53 Wis. 244. Mere hesitancy or a refusal on the part of the publisher of a libel to retract after being advised of the error

is not evidence of actual malice in the original publication: *Bradley v. Cramer*, 66 Wis. 297.

⁸ *Barnes v. Campbell*, 60 N. H. 27.

⁹ *Kelly v. Partington*, 4 Barn. & Adol. 700; 2 Nev. & M. 460; *Jackson v. Hopperton*, 16 Com. B., N. S., 829; *Rogers v. Sir Gervas Clifton*, 3 Bos. & P. 587.

¹⁰ *Cochran v. Butterfield*, 18 N. H. 115; 45 Am. Dec. 363.

¹¹ *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33.

crime, the record of acquittal in a criminal prosecution for the same crime is not admissible to show malice.¹

ILLUSTRATIONS.—The rector dismissed the parish school-master for refusing to teach in the Sunday-school. The school-master opened another school, on his own account, in the parish. The rector published a pastoral letter warning all parishioners not to support “a schismatical school,” and not to be partakers with the plaintiff “in his evil deeds,” which tended “to produce disunion and schism,” and “a spirit of opposition to authority.” *Held*, evidence to go to the jury that the rector cherished anger and malice against the school-master: *Gilpin v. Fowler*, 9 Ex. 615. The defendant wrote a letter to be published in the newspaper. The editor struck out all the more outrageous passages, and published the remainder. *Held*, that the defendant’s manuscript was admissible in evidence, and the obliterated passages to show the *animus* of the defendant: *Tarpley v. Blaby*, 2 Scott, 642. Defendant, subsequently to the slander, admitted that there had been a dispute between himself and the plaintiff prior to the slander about a sum of money which the plaintiff claimed from the defendant. At the trial, also, the plaintiff offered to accept an apology and a verdict for nominal damages, if defendant would withdraw his plea of justification. The defendant refused to withdraw the plea, yet did not attempt to prove it. *Held*, evidence of malice: *Simpson v. Robinson*, 12 Q. B. 511. The defendant verbally accused the plaintiff of perjury. Subsequently to the slander, defendant preferred an indictment against the plaintiff for perjury, which was ignored by the grand jury. *Held*, admissible as evidence that the slander was deliberate and malicious, although it was a fit subject for an action for malicious prosecution: *Tate v. Humphrey*, 2 Camp. 73, note. The defendant tendered to B. two one-pound notes on the plaintiffs’ bank, which B. returned to him, saying there was a run upon that bank, and he would rather have gold. The defendant, the very next day, told two or three people confidentially that the plaintiffs’ bank had stopped, and that nobody would take their bills. *Held*, that this exaggeration of the report was some evidence of malice to go to the jury: *Bromage v. Prosser*, 4 Barn. & C. 247; 6 Dowl. & R. 296; 1 Car. & P. 475. A told the second-master of a school that he had seen one of the under-masters of the school on one occasion coming home at night “under the influence of drink,” and desired him to acquaint the authorities with the fact. The second-master subsequently stated to the governors that it was notorious that the under-master came home “almost habitually

¹ *Corbley v. Wilson*, 71 Ill. 209; 22 Am. Rep. 98.

in a state of intoxication." There was no other evidence of malice. *Held*, evidence of malice to go to the jury: *Hume v. Marshall*, Odgers on Libel and Slander, 282. Defendant was a customer at plaintiff's shop, and had occasion to complain of what he considered fraud and dishonesty in the plaintiff's conduct of his business; but instead of remonstrating quietly with him, defendant stood outside the shop-door and spoke so loud as to be heard by every one passing down the street. The language he employed, also, was stronger than the occasion warranted. *Held*, evidence of malice to go to the jury: *Oddy v. Lord George Paulet*, 4 Fost. & F. 1009. Action against the proprietors of a newspaper for publishing a libel; the report was received from an established news agency, published in but one edition of the paper, suppressed in subsequent ones; some of the copies of the paper, unsold when it was discovered, were not destroyed, and one copy was sold, and on the following day a retraction was published. Actual malice on the part of the corporation or any of its officers was not proved. *Held*, that the evidence would not authorize the jury to find actual malice on the part of the defendant: *Samuels v. Association*, 16 N. Y. Sup. Ct. 288.

CHAPTER LXVIII.

DAMAGES—EVIDENCE—PLEADING.

- § 1302. General damages.
- § 1303. Evidence—In aggravation.
- § 1304. Evidence—In mitigation.
- § 1305. Special damage—What is and what is not.
- § 1306. Pleading.
- § 1307. Who may sue.
- § 1308. Law and fact.

§ 1302. **General Damages—Measure of.**—General damages are such as the law presumes to be the natural or probable consequence of the defamatory words. Such damages are presumed only where the words are actionable *per se*,¹ and they need not, in such cases, be proved.² But if the words are not actionable *per se*, some damage, however slight, must be proved.³

The amount at which the plaintiff's general damages are to be assessed lies with the jury, who may, if they please, give vindictive damages to punish the defendant for his misconduct.⁴ Damages for wounded feelings are

¹ I. e., where the words are printed or written, and in three cases where they are oral (as to these, see *ante*, §§ 1245). Evidence of pecuniary loss is unnecessary to a right of action for a libelous charge of an attempt to commit murder: *Republican Pub. Co. v. Miner*, Col. 1889. So from the fact that one is charged with being a thief, it may be presumed that he suffered mental anguish: *Peters v. Bournean*, 22 Ill. App. 177.

² *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105; *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43; *Newbit v. Statuck*, 35 Me. 315; 58 Am. Dec. 706.

³ *Linney v. Maton*, 13 Tex. 454; *McQueen v. Fulgham*, 27 Tex. 463; *Brandt v. Townley*, 13 Wend. 253.

⁴ *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314; *Hosley v.*

Brooks, 20 Ill. 115; 71 Am. Dec. 252; *Lick v. Owen*, 47 Cal. 252; *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Bowe v. Rogers*, 50 Wis. 598; *Klewin v. Bauman*, 53 Wis. 244; *Sowers v. Sowers*, 87 N. C. 303; *Burckhalter v. Coward*, 16 S. C. 435; *Meyer v. Bohlfrig*, 44 Ind. 238; *Wilms v. White*, 26 Md. 380; 90 Am. Dec. 113. In *Gibson v. Cincinnati Enquirer*, 2 Flipp. 121, in refusing to set aside a verdict of \$3,875 against a newspaper for charging the plaintiff with adultery, Brown, J., reviewed the cases on the measure of damages, saying: "A few instances where applications have been refused will show the general reluctance of courts to set aside verdicts in actions of this kind upon the ground of excessive damages. In *McDougall v. Sharp*, 1 City H. Rec., the charge was perjury, and the verdict \$3,500, which the court refused to disturb; in *Tillot-*

allowable, if the plaintiff's character, public or private, is proved to have been injured by the libel.¹ But damages for prospective suffering are not recoverable.²

The fact that the libel renders the defendant liable to an indictment does not prevent the jury from giving vindictive damages.³ If the jury decide that all the actual damages sustained are merely nominal, punitive damages are

son v. Cheetham, 2 Johns. 63, the court refused to set aside a verdict for \$1,400 for accusing the plaintiff of political corruption. 'A case must be very gross and the recovery enormous to justify our interposition on a mere question of damages in an action for slander.' In *Ryckman v. Parkins*, 9 Wend. 470, a verdict in slander of \$7,000 was sustained; in *Trumbull v. Gibbons*, N. Y. Jud. Rep. 1, a verdict of \$15,000, and in *Fry v. Bennett*, 4 Duer, 247, one of \$10,000 for publishing charges against the plaintiff as manager of an opera company, were also held insufficient to justify the interference of the court. In *Dubery v. Gunning*, 6 Term Rep. 651, the court refused to disturb a verdict of £5,000 in an action for criminal conversation; and in *Coffin v. Coffin*, 4 Mass. 1, the court sustained a verdict of \$2,500 for slander spoken in the house of representatives. The case was tried in 1808, when the purchasing value of \$2,500 was at least twice what it is to-day. In *Letton v. Young*, 2 Met. (Ky.) 558, the supreme court of Kentucky refused to set aside a verdict of \$4,000 in an action of slander. The cases of this character in which the courts have granted new trials upon this ground are not only very rare, but will always be found to be accompanied by strongly mitigating circumstances. In *Nettles v. Harrison*, 2 McCord, 230, the defendant said of the plaintiff that he kept a house of prostitution; verdict \$5,000. A new trial was granted, as the words were uttered but once, and were induced by plaintiff encouraging defendant's son to visit his house, having daughters of none the best characters, with whom his son had been too intimate. In *Freeman v. Tinsley*, 50 Ill. 497, a verdict of \$2,500 was set

aside in an action for slander, where the words were spoken in high excitement, provoked by the plaintiff; and under a plea of justification it was shown the plaintiff had been indicted for the crime with which he was charged, and in connection with proof of doubtful associations and suspicious character. In the case of *Scripps v. Reilly*, 4 Cent. L. J. 128, a libel was published in a newspaper having about the circulation of the *Enquirer*, imputing a charge of adultery to a prominent citizen of Detroit, the jury returned a verdict for \$4,000, and although a new trial was finally obtained, the fact that the damages were excessive was not suggested by the astute counsel who defended the case. Upon the retrial the verdict was increased to \$5,000. In *Neal v. Lewis*, 2 Bay, 204, the supreme court of South Carolina refused to set aside a verdict for \$3,000 for calling the plaintiff a rascal, villain, swindler, and thief." In *Beggarly v. Craft*, 31 Ga. 309, 76 Am. Dec. 687, a verdict of \$4,250 was set aside when the charge was that the plaintiff was unchaste. In A's action against B for slander in saying that A burned B's barns, a verdict for A for \$4,000 was held excessive, it appearing that the fire was incendiary; that A had expressed malice against B, intimating that his barns might be burned; that B honestly believed the declarations true; that no one else was, on full investigation, suspected; and that A had sustained little injury: *Haight v. Hoyt*, 50 Conn. 583.

¹ *Hamilton v. Eno*, 16 Hun, 599.

² *Bradley v. Cramer*, 66 Wis. 297.

³ *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367. *Contra*, *Meyer v. Bohlfrigy*, 44 Ind. 238.

not recoverable;¹ and punitive damages should be awarded in an action of slander only when in speaking the slanderous words the defendant was actuated by special ill-will, bad intent, or malevolence towards the plaintiff.² They may consider the degree of malice with which the alleged slanderous words were spoken, as shown by the subsequent acts and declarations of the defendant; but they cannot give damages for such acts and declarations, however infamous or criminal they may be.³ If it appears that the libel was published with no intent to injure, and that all proper precautions were observed in publishing it, actual damages only are recoverable,⁴ and as the amount of damages in an action for slander or libel is always a subject for the exercise of the sound discretion of the jury, who may give more or less, according to their conclusions from the whole case, respecting the motives of the publisher, a verdict in such an action will not be set aside for excessive damages, unless there is some suspicion of unfair dealing, or unless the case be such as to furnish evidence of prejudice, partiality, or corruption on the part of the jury. The case must be very gross and the damages very erroneous to justify a new trial on the question of damages.⁵ The jury may, in estimating compensatory damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation.⁶ The measure of damages against husband and wife for the wife's libel

¹ *Stacy v. Portland Publishing Co.*, 68 Me. 279.

² *Templeton v. Graves*, 59 Wis. 95.

³ *Stitzell v. Reynolds*, 67 Pa. St. 54; 5 Am. Rep. 396.

⁴ *Evening News Ass'n v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450.

⁵ *Neal v. Lewis*, 2 Bay, 204; 1 Am. Dec. 640; *Coleman v. Southwick*, 9 Johns. 45; 6 Am. Dec. 253; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228; *Davis v. Ruff*, Cheves, 17; 34 Am. Dec. 584; *Sanders v. Johnson*, 6 Blackf. 50; 36 Am. Dec. 564; *Shute v.*

Barrack, 7 Pick. 84; *Trabue v. Mays*, 3 Dana, 138; 23 Am. Dec. 61; *Humphries v. Parker*, 52 Me. 808; *Beehler v. Steever*, 2 Whart. 326; *Burt v. McBain*, 29 Mich. 260; *Miles v. Harrington*, 8 Kan. 425; *Snyder v. Fulton*, 34 Md. 128; 6 Am. Rep. 314; *Marks v. Jacobs*, 76 Ind. 216; *Molloy v. Bennett*, 15 Fed. Rep. 371; *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149; and see note to *Terrilliger v. Wands*, 72 Am. Dec. 426-436.

⁶ *Finney v. Smith*, 31 Ohio St. 529; 27 Am. Rep. 524.

is the same as it would be against her alone if she were sole.¹

§ 1303. **Evidence — In Aggravation.** — Evidence of malice is relevant in aggravation of damages.² So is defendant's conduct of his own case, and even the language used by his counsel at the trial;³ so is the repetition of the actionable words at other times;⁴ so in an action against a newspaper, libelous publications from the same paper relating to other parties are admissible for the purpose of showing that the paper was recklessly conducted;⁵ so evidence of the reckless and wanton conduct of the defendant's employees in writing the libel is admissible;⁶ so it is admissible to prove mental distress, sickness, etc.⁷ An unsuccessful attempt to justify, except in some states where the rule is abolished by statute, may be taken into account in aggravation of damages;⁸ and where special

¹ *Austin v. Wilson*, 4 Cush. 273; 50 Am. Dec. 766.

² *Bromage v. Prosser*, 1 Car. & P. 475. See *Malice*, § 1301.

³ *Darby v. Ouseley*, 25 L. J. Ex. 230, 233; *Blake v. Stevens*, 4 Fost. & F. 235; *Risk Allah Bey v. Whitehurst*, 18 L. T. 615.

⁴ *Hatch v. Potter*, 2 Gilm. 725; 43 Am. Dec. 88; *Williams v. Harrison*, 3 Mo. 411; *Kean v. McLaughlin*, 2 Serg. & R. 469; *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762; *Markham v. Russell*, 12 Allen, 573; 90 Am. Dec. 169. *Contra*, *Frazer v. McCloskey*, 60 N. Y. 337; 19 Am. Rep. 193; *McGlenery v. Karter*, 3 Blackf. 488; *Stein v. Loewenthal*, 77 Cal. 340; *Sullivan v. O'Leary*, 146 Mass. 322.

⁵ *Gibson v. Cincinnati Enquirer*, 5 Cent. L. J. 380.

⁶ *Bruce v. Reed*, 104 Pa. St. 408; 49 Am. Rep. 586.

⁷ *Rea v. Harrington*, 58 Vt. 181; 56 Am. Rep. 561; *Zeliff v. Jennings*, 61 Tex. 458. Where the words are not actionable *per se*, mental distress, illness, expulsion from a religious society, etc., do not constitute special damage. But where the words are actionable *per se*, the jury may take

such matters into their consideration in according damages. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested": *Lynch v. Knight*, 9 H. L. Cas. 598; *Chesley v. Thompson*, 137 Mass. 136.

⁸ *Wannak v. Foulkes*, 12 Mees. & W. 508; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Gorman v. Sutton*, 32 Pa. St. 247; *Freeman v. Tinsley*, 50 Ill. 497; *Root v. King*, 7 Cow. 613; *Cavanaugh v. Austin*, 42 Vt. 576; *Harbison v. Shook*, 41 Ill. 141; *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96; *Purple v. Horton*, 13 Wend. 9; 27 Am. Dec. 167; *Burckhalter v. Coward*, 16 S. C. 435; *Klinch v. Colby*, 46 N. Y. 427; 7 Am. Rep. 360. A plea of justification cannot be considered in aggravation of damages if the evidence introduced in its support shows that defendant had reason to believe the charge true: *Byrket v. Monohno*, 7 Blackf. 83; 41 Am. Dec. 212.

damage is not essential to the action, it may nevertheless be proved to enhance the damages.¹ Evidence of plaintiff's good character is inadmissible, unless it is in issue by the pleadings, or has been attacked by evidence.² In assessing damages, the jury may take into consideration the plaintiff's position or his character as a public officer.³ So evidence of the pecuniary circumstances of the slanderer, his position and influence in society, is admissible.⁴ In an action for slander, evidence of the pecuniary condition of the defendant is competent to increase the damages, when the plaintiff is entitled to vindictive or punitive damages, but the pecuniary condition of the plaintiff is not competent for such purpose, while it may be to show actual damage.⁵

§ 1304. **In Mitigation.**—In mitigation of damages the defendant may show that he has made apology and amends as far as able for the injury done.⁶ So he may show that the publication was made in good faith and without mal-

¹ Odgers on Libel and Slander, 318.

² *Cornwall v. Richardson*, Ryan & M. 305; *Guy v. Gregory*, 9 Car. & P. 584; *Fountain v. Bedle*, 3 Q. B. 5; *Rhodes v. Ijames*, 7 Ala. 574; 42 Am. Dec. 604. But in *Williams v. Haig*, 3 Rich. 362; 45 Am. Dec. 774, the contrary was held; so in *Buford v. McClun*, 1 Nott & McC. 269; *Williams v. Greenmanse*, 3 Dana. 432; *Scott v. Peebles*, 10 Miss. 546; *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455.

³ *Tillotson v. Cheetham*, 3 Johns. 56; 3 Am. Dec. 459; *Larned v. Bufinton*, 3 Mass. 546; 3 Am. Dec. 185; *Justice v. Kirlm*, 17 Ind. 588; *Klumph v. Dunn*, 66 Pa. St. 141; 5 Am. Rep. 353. In an action for libel in calling plaintiff a thief, evidence that he had a wife and family admissible on the question of damages: *Barnes v. Campbell*, 60 N. H. 27; *Rhodes v. Nagles*, 66 Cal. 677. Evidences of the plaintiff's poverty is irrelevant: *Pool v. Devers*, 30 Ala. 672. See *Reeves v.*

Winn, 97 N. C. 246; 2 Am. St. Rep. 287.

⁴ *Hosley v. Brooks*, 20 Ill. 115; 71 Am. Dec. 252; *Brown v. Barnes*, 39 Mich. 211; 33 Am. Rep. 375; *Wilms v. White*, 26 Md. 380; 90 Am. Dec. 113; *Bennett v. Hyde*, 6 Conn. 24; *Barber v. Barber*, 33 Conn. 335; *Karney v. Paisley*, 13 Iowa, 89; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Reeves v. Winn*, 97 N. C. 246; 2 Am. St. Rep. 287. But see *Brown v. Barnes*, 39 Mich. 211; 33 Am. Rep. 375; *Rosewater v. Hoffman*, 24 Neb. 222. On the question of exemplary damages, defendant may show that he is a man of no property: *Rea v. Harrington*, 58 Vt. 181; 56 Am. Rep. 561.

⁵ *Reeves v. Winn*, 97 N. C. 246; 2 Am. St. Rep. 287.

⁶ *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198; *Hotchkiss v. Oliphant*, 2 Hill, 510. But not a retraction published after the suit: *Evening News Association v. Tryon*, 42 Mich. 549; 36 Am. Rep. 450.

ice,¹ or that he did not originate the libel, but merely repeated what he heard,² or published what he had seen in another paper.³ Evidence of general reports of the truth of the charge is admissible in some states; in others, not.⁴ Evidence of the plaintiff's general bad character, and his bad character as to the crime charged, is admissible.⁵ It has been held that evidence of the ante-

¹ *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96. A publisher of a newspaper may show, under the general issue, that he was imposed on and induced to publish the article by certain forged letters purporting to have been written by reputable citizens and indorsing the charges made: *Storey v. Earley*, 86 Ill. 461; or that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business: *Runkle v. Meyer*, 3 Yeates, 518; 2 Am. Dec. 393.

² *Cook v. Barkley*, 1 N. J. L. 169; 2 Am. Dec. 343; *Easterwood v. Quin*, 2 Brev. 64; 3 Am. Dec. 700. But see *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec. 497.

³ *Hewitt v. Pioneer-Press*, 23 Minn. 178; 23 Am. Rep. 680. *Contra*, *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271.

⁴ In *Pease v. Shippen*, 80 Pa. St. 513, 21 Am. Rep. 116, it is said: In England and in some of the states such evidence is admissible under the general issue in slander in mitigation of damages: *Earl of Leicester v. Walter*, 2 Camp. 251; *Wetherbee v. Marsh*, 20 N. H. 561; 51 Am. Dec. 244; *Case v. Marks*, 20 Conn. 248; *Fuller v. Dean*, 31 Ala. 654; *Galloway v. Courtney*, 10 Rich. 414; *Calloway v. Middleton*, 2 A. K. Marsh. 372; 12 Am. Dec. 409; *Henson v. Veatch*, 1 Blackf. 369. In other states it has been held that general reports of the truth of the charges cannot be given in evidence in mitigation of damages: *Walcott v. Hall*, 6 Mass. 514; 4 Am. Dec. 173; *Alderman v. French*, 1 Pick. 17; 11 Am. Dec. 114; *Codwell v. Swan*, 3 Pick. 376; *Matson v. Buck*, 5 Cow. 499; *Root v. King*, 9 Cow. 613; *Cole v. Perry*, 8 Cow. 214; *Mapes v. Weeks*, 4 Wend. 659; *Inman*

v. Foster, 8 Wend. 602; *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271; *Young v. Bennett*, 4 Scam. 43; *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec. 497. But whatever may have been at one time the rule in this state as to the admission of such reports (*Kennedy v. Gregory*, 1 Binn. 85; *Beehler v. Steever*, 2 Whart. 313; *Smith v. Stewart*, 5 Pa. St. 372), it must now be regarded as the settled law of Pennsylvania that they are not admissible for any purpose: *Fitzgerald v. Stewart*, 53 Pa. St. 343; *Lukehart v. Byerly*, 53 Pa. St. 418; *Long v. Brougher*, 5 Watts, 439; *Conroe v. Conroe and Wife*, 47 Pa. St. 201. *Held*, admissible in *Bailey v. Kal. Pub. Co.*, 40 Mich. 251; *Treat v. Browning*, 4 Conn. 408; 10 Am. Dec. 156; *Bowen v. Hall*, 20 Vt. 232; *Huson v. Dale*, 19 Mich. 17; 2 Am. Rep. 66; *Farr v. Rasco*, 9 Mich. 353; 80 Am. Dec. 88. *Held*, not admissible in *Bradley v. Gibson*, 9 Ala. 406; *Sanders v. Johnson*, 6 Blackf. 50; 36 Am. Dec. 564; *Kelley v. Dillon*, 5 Ind. 426; *Beardsley v. Broogmen*, 17 Iowa, 290; *Ridley v. Perry*, 16 Me. 21; *Kenney v. McLaughlin*, 5 Gray, 3; *Peterson v. Morgan*, 116 Mass. 350; *Wier v. Allen*, 51 N. H. 177; *Hackett v. Brown*, 2 Heisk. 264; *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514; *Haskins v. Lumdsen*, 10 Wis. 359; *McGee v. Sodusky*, 5 J. J. Marsh. 185; 20 Am. Dec. 251; *Mahoney v. Belford*, 132 Mass. 393.

⁵ *Maxwell v. Kennedy*, 50 Wis. 645; *Eastland v. Caldwell*, 2 Bibb, 21; 4 Am. Dec. 668; *Sawyer v. Eifert*, 2 Nott & McC. 511; 10 Am. Dec. 633; *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec. 497; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96; *Lamos v. Snell*, 6 N. H. 413; 25 Am.

cedent general reputation of the plaintiff's bad character is admissible, and so is evidence that the plaintiff had certain vicious habits which would lead him to commit such acts as that ascribed to him in the slander; but that evidence of a general report that plaintiff had actually committed the particular offense charged by the slander was not admissible. In this case an officer charged another with stealing a watch; a third officer in the same regiment was called to state that he had previously heard rumors that the plaintiff had stolen that watch, but his evidence was rejected; and the court, on appeal, held that such rejection was right.¹ But general bad character subsequent to the speaking of the words cannot be proved, even though such character could not possibly have been caused by the words spoken, as where the charge was that the plaintiff was a thief, and it was sought to be proved that she was subsequently reputed to be a common prostitute.² So where unchastity is imputed to a female, evidence of actual prostitution two months after the speaking of the words is not admissible.³ The defendant cannot plead, either in defense or mitigation, that the plaintiff has been guilty of a specific crime

Dec. 468; *Waters v. Jones*, 3 Port. 442; 29 Am. Dec. 261; *Edwards v. Kansas City Times Co.*, 32 Fed. Rep. 813; *Parkhurst v. Ketchum*, 6 Allen, 406; 83 Am. Dec. 639; *Stone v. Varney*, 7 Met. 86; 39 Am. Dec. 762; *Byrket v. Monohon*, 7 Blackf. 83; 41 Am. Dec. 212; *Wetherbee v. Marsh*, 20 N. H. 561; 51 Am. Dec. 244; *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271; *Shilling v. Carson*, 27 Md. 175; 92 Am. Dec. 632; *Wright v. Schroeder*, 2 Curt. 548; *Rhodes v. Ijames*, 7 Ala. 574; 42 Am. Dec. 604; *Holley v. Burgess*, 9 Ala. 728; *Matthews v. Huntly*, 9 N. H. 146; *Springstein v. Field*, Anth. 185; *Iler v. Cromer*, Wright, 441; *Severance v. Hilton*, 24 N. H. 147; *Shipman v. Burows*, 1 Hall, 399; *Tibbs v. Brown*, 2 Grant Cas. 39; *Chubb v. Gsell*, 34 Pa. St. 114; *Seymour v. Merrills*, 1 Root, 459; *Burton*

v. March, 6 Jones, 409; *Moyer v. Moyer*, 49 Pa. St. 210; *Warner v. Lockerby*, 31 Minn. 421; *B. v. I.*, 22 Wis. 372; 94 Am. Dec. 604. But the defendant cannot in mitigation rely on his own bad character: *Hastings v. Stetson*, 130 Mass. 76.

¹ *Bell v. Parke*, 11 I. C. L. R. 413. Defendant may prove in mitigation of damages in action of slander for words spoken against the chastity of the plaintiff's wife, that said wife, before her marriage with the plaintiff, had lived alone with him in the same house, where the fact of their so living was known to the defendant when he spoke the words: *Reynolds v. Tucker*, 6 Ohio St. 516; 67 Am. Dec. 353.

² *Douglass v. Tousey*, 2 Wend. 352; 20 Am. Dec. 616.

³ *Beggarly v. Craft*, 31 Ga. 309; 76 Am. Dec. 687.

in no way connected with the alleged defamatory words or with the occasion on which they were written or spoken.¹

So it is admissible to show that the words were spoken in the heat of passion or under excitement,² or that he was provoked to the use of intemperate language by the conduct and language of plaintiff. The law makes allowance in a case of this kind for the infirmities of human nature, and for what is done in the heat of passion produced by the improper conduct of the adverse party.³ And provocation being admissible in mitigation,⁴ it is competent for the defendant to put in evidence slanderous statements made by the plaintiff to a third person concerning the defendant, and by such third person communicated to the defendant, before the speaking of the slanderous words by the latter.⁵ The anger or passion of defendant at the time of the publication of the slanderous words is no justification, or even mitigation, unless it is shown the passion was provoked by plaintiff, and even then it can only be proved in mitigation of damages.⁶ And the principle which allows proof of provocation in mitigation of damages is inapplicable where it is sought to prove, in mitigation of damages in an action for libel, that the alleged libelous publication was induced by the hasty

¹ *Fisher v. Tice*, 20 Iowa, 479; *Forshée v. Abrams*, 2 Iowa, 571; *Fountain v. West*, 23 Iowa, 9; 92 Am. Dec. 405.

² *Jauch v. Jauch*, 50 Ind. 135; 19 Am. Rep. 699; *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 195; *Flagg v. Roberts*, 67 Ill. 485.

³ *Newman v. Stein*, Mich. 1889.

⁴ *Jauch v. Jauch*, 50 Ind. 135; 19 Am. Rep. 699; *Moore v. Clay*, 24 Ala. 235; 60 Am. Dec. 461. Provided the plaintiff participated in the act which is alleged was the provocation: *Williams v. McManus*, 38 La. Ann. 161; 58 Am. Rep. 171; and the occasion was connected with the defendant's act: *Porter v. Henderson*, 11 Mich. 20; 82 Am. Dec. 59. "There can be no set-

off of one libel or misconduct against another; but in estimating the compensation for the plaintiff's injured feelings, the jury might fairly consider the plaintiff's conduct, and the degree of respect he has shown for the feelings of others": *Blackburn, J.*, in *Kelly v. Sherlock*, L. R. 1 Q. B. 698. But not a provocation given to the defendant by the plaintiff on the evening before the slanderous words were uttered: *Sheffill v. Van Deusen*, 15 Gray, 485; 77 Am. Dec. 377. A slander is not justified by the circumstance that the first harsh expression was used by the one slandered: *Hosley v. Brooks*, 20 Ill. 115; 71 Am. Dec. 252.

⁵ *Walker v. Flynn*, 130 Mass. 151.

⁶ *Miller v. Johnson*, 79 Ill. 59.

promptings of passion caused by a previous provoking publication at the instance of the plaintiff, in itself irrelevant to the issue in the action, if there had been time and opportunity for hot blood to cool. And the answer in such case alleging that the publication which induced the libel in question was made the day before the latter publication, but not stating when it came to the knowledge of the defendant, may be properly stricken out.¹ Where an alleged libelous article is one of a series relating to a matter of public concern, the defendant may introduce them all to show good faith on his part.² But he cannot show the recovery of damages in favor of the plaintiff against the defendant in another action for a libel published in one of a series of numbers of the same paper, and which contained the same libelous words as were charged in the present suit.³ But evidence is admissible in mitigation of damages to show that plaintiff had previously himself published a libel, provided it be also known that this libel had come to the defendant's knowledge and occasioned the publication of the libel now sued on;⁴ but counter publications which are not libelous, and could have no force as a provocation, are not admissible in mitigation of damages.⁵

And in no case can the defendant avail himself of any facts in mitigation of damages, unless it appears that he was informed thereof when he uttered the words, and that he did so under a belief in their truth. This need not be by direct evidence, if the facts are shown to have been so notorious as to create a fair presumption that

¹ *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528; 8 Am. St. Rep. 693.

² *Scripps v. Foster*, 41 Mich. 742; *Morehead v. Jones*, 2 B. Mon. 210; 36 Am. Dec. 600.

³ *Tillotson v. Cheetham*, 3 Johns. 56; 3 Am. Dec. 459.

⁴ *Hartford v. State*, 98 Ind. 461; 49 Am. Rep. 185; *Finnerty v. Tipper*, 2 Camp. 76; *Antony Pasquin's Case*,

cited 1 Camp. 351; *Tarpley v. Blabey*, 2 Bing. N. C. 437; *May v. Brown*, 3 Barn. & C. 113; 4 Dowl. & R. 670; *Watts v. Fraser*, 7 Ad. & E. 223; 7 Car. & P. 369; *Wakley v. Johnson*, Ryan & M. 422; *Shattuc v. McArthur*, 29 Fed. Rep. 136; *Maynard v. Beardsley*, 7 Wend. 560; 22 Am. Dec. 595.

⁵ *Whittemore v. Weiss*, 33 Mich. 348.

they had come to his knowledge.¹ Evidence in mitigation of damages is admissible, notwithstanding a plea of justification.² Under the New York code, the defendant may prove in mitigation of damages such facts and circumstances as show the absence of malice, though they tend to prove the truth of the libel, and he may do this without averring in his answer the truth of the libel.³

Evidence is not admissible in mitigation that the plaintiff has stated that the slander did him no injury.⁴ So a bare expression of satisfaction at an apology and recantation will not operate as a release of the right of action.⁵ An attempt of the husband to prevent the circulation of the slander spoken by his wife cannot be proved in mitigation of damages in an action of slander brought against the two.⁶ Though the answer sets up no facts in mitigation of damages, the manner, nature, extent, and circumstances of the publication being proved by plaintiff, an instruction that as defendant alleges nothing in mitigation, the jury could consider nothing, is improper, as any circumstances of a mitigatory character proved by plaintiff should be regarded.⁷

ILLUSTRATIONS. — Defendant was sued for slander in charging plaintiff with unchastity. *Held*, that he might show, by way of mitigation, the circumstances upon which he based his charge, such as the physical appearance of pregnancy in plaintiff, and the fact of her being with a man under suspicious circumstances: *Doe v. Roe*, 32 Hun, 628. The slander consisted in calling plaintiff a thief and scoundrel. Defendant testified that at the time he used the language he believed that his property had been stolen. *Held*, admissible in mitigation of damages: *Morris v. Lachman*, 68 Cal. 109. Defendant said of plaintiff: "You are a thief and a scoundrel; you have made false entries in my books; you have sold flour for me, and

¹ *Hatfield v. Lasher*, 57 How. Pr. 258; 17 Hun, 23; *Bailey v. Hyde*, 3 Conn. 463; 8 Am. Dec. 202.

² *Morehead v. Jones*, 2 B. Mon. 210; 36 Am. Dec. 600.

³ *Bush v. Prosser*, 11 N. Y. 347.

⁴ *Porter v. Henderson*, 11 Mich. 20; 82 Am. Dec. 59.

⁵ *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198.

⁶ *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43.

⁷ *Moore v. Manufacturers' National Bank*, 21 N. Y. St. Rep. 652.

collected therefor more than you accounted to me for, and kept the balance," etc. *Held*, that the defendant might show in mitigation of damages that the plaintiff had been discharged from his employment several weeks before the slanderous words were spoken, and had, after his discharge, gone about among the defendant's customers, warning them that defendant would charge them usurious interest, sell them out, and break them up: *Palmer v. Lang*, 7 Daly, 33. Defendant had charged plaintiff, a female, with incontinency. *Held*, that he might show his mental suffering caused by his belief that she had seduced his son: *McDougald v. Coward*, 95 N. C. 368.

§ 1305. Special Damage—What is and What is not.

—Special damages are such as the law will not presume to have followed the publication of the defamation, but which must be alleged and proved.¹ Such damage must be the natural, immediate, and legal consequence of the words; it is not enough that they have actually caused damage, if it cannot be presumed that the defendant when he uttered the slander or published the libel knew, or ought to have known, that such damage would result.² Such loss may be either the loss of some right or position already acquired, or the loss of some future benefit or advantage the acquisition of which is prevented.³ Special damage may be the loss of any material temporal advantage.⁴ The loss of a marriage,⁵ of employment, of custom, of profits, and even of gratuitous entertainment and hospitality,⁶ will constitute special damage; so will the loss of a gratuity or present,⁷ or of the *consortium* of a husband,⁸ or of an office,⁹ or the refusal of employ-

¹ An allegation of special damage will not help the plaintiff, if the words are not defamatory: *Legg v. Dunlevy*, 10 Mo. App. 461.

² *Olmstead v. Brown*, 12 Barb. 657; *Beach v. Ranney*, 2 Hill, 307; *Anonymous*, 60 N. Y. 262; 19 Am. Rep. 174; *Pettibone v. Simpson*, 66 Barb. 492; *McQueen v. Fulgham*, 27 Tex. 463; *Legg v. Dunlevy*, 10 Mo. App. 463.

³ *Odgerson on Libel and Slander*, 310.

⁴ *Matthew v. Crass*, Cro. Jac. 323.

⁵ *Matthew v. Crass*, Cro. Jac. 323.

⁶ *Moore v. Meagher*, 1 Taunt. 39; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Storey v. Challands*, 8 Car. & P. 284; *Bergmann v. Jones*, 94 N. Y. 51.

⁷ *Bracebridge v. Wilson*, Lilly's Entries, 61; *Hartley v. Herring*, 8 Term R. 130.

⁸ *Lynch v. Knight*, 9 H. L. Cas. 589, per Campbell and Cranworth, JJ.

⁹ *Davis v. Gardiner*, 4 Rep. 17.

ment,¹ or the loss of a situation,² or that persons who had been in the habit of so doing refused any longer to supply plaintiff with food and clothing,³ or that the plaintiff was turned away from the house of her uncle, where she had previously been a welcome visitor, and charged not to return till she had cleared up her character,⁴ or that the plaintiff was refused entertainment at a public house.⁵ But mere annoyance or mental anxiety, or even physical illness, occasioned by the slanderous report, is not sufficient,⁶ nor the loss of the society of friends and neighbors,⁷ nor the desertion of the plaintiff's wife,⁸ nor that the plaintiff was expelled from a religious society of which she was a member,⁹ nor the loss of the privilege of half-fare tickets on a railroad by a clergyman,¹⁰ nor an apprehension of future loss.¹¹

So the special damage must be the proximate, and not the remote, consequence of the defamatory words, and must be their direct result, and not the compound result, of the words and other matters, for which the defendant is not responsible. But it may be the act of a third party, and then if the defendant might reasonably have antici-

¹ *Sterry v. Foreman*, 2 Car. & P. 592.

² *Martin v. Strong*, 5 Ad. & E. 535. But *aliter* where the dismissal is colorable, the master intending to take the servant back when the lawsuit is determined: *Coward v. Welling-ton*, 7 Car. & P. 531.

³ *Beach v. Ranney*, 2 Hill, 309.

⁴ *Williams v. Hill*, 19 Wend. 305.

⁵ *Olmsted v. Miller*, 1 Wend. 506.

⁶ *Allsop v. Allsop*, 5 Hurl. & N. 534; *Lynch v. Knight*, 9 H. L. Cas. 577; *Prime v. Eastwood*, 45 Iowa, 640; *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420, the court saying: "It would be highly impolitic to hold all language wounding the feelings and affecting unfavorably the health and ability to labor of another a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise, his strength of mind to

disregard abusive insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations." Nor in an action by the husband is the loss of the wife's services caused by illness, the result of the defamatory words, sufficient special damage: *Wilson v. Goit*, 17 N. Y. 445.

⁷ *Medhurst v. Balam*, cited 1 Sid. 397; *Barnes v. Brudde*, 1 Lev. 261; 1 Sid. 396.

⁸ *Georgia v. Kepford*, 45 Iowa, 48.

⁹ *Roberts v. Roberts*, 5 Best & S. 384.

¹⁰ *Shurtleff v. Stevens*, 51 Vt. 501.

¹¹ *Onslow v. Horne*, 3 Wils. 188.

pated such a result, he is liable. "To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words."¹ But it is essential that the party whose act constitutes the special damage should have believed the words to be true.²

ILLUSTRATIONS.—A vicar in open church falsely declared that the plaintiff, one of his parishioners, was excommunicated, and refused to celebrate divine service till the plaintiff departed out of church, whereby the plaintiff was compelled to quit the church, and was scandalized, and was hindered of hearing divine service for a long time. *Held*, that an action lay: *Barnabas v. Traunter*, 1 Vin. Abr. 396. In consequence of defendant's words, a friend who had previously voluntarily promised to give the plaintiff, a married woman, money to enable her to join her husband in Australia, whither he had emigrated three years before, refused to do so. *Held*, sufficient special damage: *Corcoran v. Corcoran*, 7 I. R. C. L. 272. Plaintiff lost his place as clerk and weighmaster by reason of defendant's having falsely and maliciously said of plaintiff, "He has caused the downfall and ruin of my clerk," and, in effect, that defendant did not want plaintiff to weigh any goods consigned to defendant. *Held*, that the words were actionable: *Wilson v. Cottman*, 65 Md. 190. In consequence of defendant's slandering the plaintiff, a dissenting minister, his congregation diminished. *Held*, insufficient, as it did not appear that the plaintiff lost any emolument thereby: *Hopwood v. Thorn*, 19 L. J. Com. P. 94; 8 Com. B. 293. A. told N. that T. had committed adultery with Mrs. F. N. had married Mrs. F.'s sister, and was an intimate friend of T.; N. told T. what people were saying of him, whereupon T. became melancholy, lost his appetite, and was unable to work. *Held*, that such distress and illness were not sufficient special damage: *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec.

¹ *Lynch v. Knight*, 9 Hoffm. L. Cas. 60; *Haddan v. Lott*, 15 Com. B. 411; *Hicks v. Foster*, 13 Barb. 665; *Georgia v. Kepford*, 45 Iowa, 48.

² Anonymous, 60 N. Y. 262; 19 Am. Rep. 174, the court saying: "I do not think special damage can be predicated upon the act of any one

who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff caused by a belief of the truth of the charge made by the defendant that constitutes the damage which the law redresses." But it has been held otherwise in England: *Knight v. Gibbs*, 1 Ad. & E. 43.

420. The defendant said of a married man that he had had two bastards; "by reason of which words discord arose between him and his wife, and they were likely to have been divorced." *Held*, no special damage: *Barmund's Case*, Cro. Jac. 473. The defendant falsely imputed incontinence to a married woman. In consequence of his words she lost the society and friendship of her neighbors, and became seriously ill and unable to attend to her affairs and business, and her husband incurred expense in curing her, and lost the society and assistance of his wife in his domestic affairs. *Held*, that neither husband nor wife had any cause of action: *Allsop v. Allsop*, 5 Hurl. & N. 534; 29 L. J. Ex. 315; *Riding v. Smith*, 1 Ex. Div. 91; 45 L. J. Ex. 281. Defendant charged that plaintiff had been guilty of the murder of one Daniel Dolly; the plaintiff thereupon demanded that an inquest should be taken on Dolly's body, and incurred expense thereby. *Held*, that such expense was recoverable as special damage, though it was not compulsory on the plaintiff to have an inquest held: *Peake v. Oldham*, Cowp. 275; 2 W. Black. 960. A slandered the plaintiff to his master, B. Subsequently B, discovering from another source that the plaintiff's former master had discharged him for misconduct, illegally discharged him in the middle of his term. *Held*, not the proximate result of A's slander: *Vicars v. Wilcocks*, 8 East, 1. Plaintiff alleged that certain persons would have recommended him to X, Y, & Z, had not the defendant spoken certain defamatory words of him on the Royal Exchange, and that X, Y, and Z would, on the recommendation of those persons, have taken the plaintiff into their employment. The plaintiff claimed damages for the loss of the employment. *Held*, too remote, for it was caused by the non-recommendation, not by the defendant's words: *Sterry v. Foreman*, 2 Car. & P. 592. In an action of slander of title to a patent, the plaintiff alleged as special damage that in consequence of defendant's opposition, the solicitor-general refused to allow the letters patent to be granted with an amended title, as the plaintiff desired. *Held*, that this damage was too remote, being the act of the solicitor-general, and not of the plaintiff: *Haddon v. Lott*, 15 Com. B. 411; 24 L. J. Com. P. 49; *Kerr v. Shedden*, 4 Car. & P. 528. The plaintiff engaged Mdle. Mara to sing at his concerts; the defendant libeled Mdle. Mara, who consequently refused to sing, lest she should be hissed and ill-treated; the result was that the concerts were more thinly attended than they otherwise would have been, whereby the plaintiff lost money. *Held*, that the damage to the plaintiff was too remote: *Ashley v. Harrison*, 1 Esp. 48. The defendant asserted that a married woman was guilty of adultery, and she was consequently expelled from the congregation and Bible society of her religious sect, and was thus prevented from obtaining a cer-

tificate, without which she could not become a member of any similar society. *Held*, no action lay: *Roberts v. Roberts*, 5 Best & S. 384. A declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine-hours' system," and "He has ruined the town by bringing about the nine-hours' system," and "He has stopped several good jobs being carried out, by being the ringleader of the system at Llanelly," whereby the plaintiff was prevented from obtaining employment in his trade at Llanelly. *Held*, that the alleged damage was not the natural or reasonable consequence of the speaking of such words: *Miller v. David*, L. R. 9 Com. P. 118; 43 L. J. Com. P. 84. The plaintiff was under twenty-one and lived at home with her father, and the defendant foully slandered her to her father, in consequence of which he refused to give her a silk dress and a course of music lessons on the piano, which he had promised her, although he entirely disbelieved the defendant's story. *Held*, not to be such special damage as will sustain the action: *Anonymous*, 60 N. Y. 262; 19 Am. Rep. 174.¹ A tells B that C, a government clerk, had spoken disrespectfully of his chief, D, and this coming to the ears of D, he discharges C from office. *Held*, that the damages are too remote to enable C to maintain an action of slander against A: *Knight v. Blackford*, 3 Mackey, 177; 51 Am. Rep. 772.

§ 1306. **Pleading.**—In slander the complaint must set out the actionable words spoken, not simply a narrative of what occurred on a certain occasion;² but it is enough to set out the substance of the words spoken;³ and in libel the entire article alleged to be libelous need not be set

¹ The court saying: "It is obvious that so far from being natural, it would be highly unnatural for a parent to withhold any favor or kindness from his child on account of a falsehood reputed about it. On the contrary, the tendency would naturally and legitimately be to induce more kindness and greater indulgence."

² *Burns v. Williams*, 88 N. C. 159.

³ *Nye v. Otis*, 8 Mass. 122; 5 Am. Dec. 79; *Whiting v. Smith*, 13 Pick. 364; *Gay v. Homer*, 13 Pick. 535; *Kennedy v. Lowry*, 1 Binn. 393; *Grubbs v. Kyzer*, 2 McCord, 305; *Pond v. Hartwell*, 17 Pick. 269; *Allen v. Perkins*, 17 Pick. 369; *Lee v. Kane*,

6 Gray, 495. A complaint setting out the alleged libelous publication, and then averring thus: "Thereby charging, and intending to charge, that plaintiff was guilty of the crime of perjury and of falsehood, and of making the false report in the leaving out of said report of the said item of fifteen thousand dollars, . . . when in truth and in fact the cost of said bridge was in said report," substantially complies with section 372 of the Revised Statutes of Indiana, declaring that it shall be sufficient to state generally that the defamatory matter was spoken of plaintiff: *Prosser v. Callis*, 117 Ind. 105.

out.¹ Slanderous words in a foreign tongue must be set out in the original, and with a translation.² An averment that the defendant is proprietor of the paper, and that the libelous matter was published in his paper, is a sufficient averment of a publication by him.³ The degree of certainty with which a libel should be set forth depends on the subject-matter; and where the ridicule consists mainly in postures and movements, the use of general language is unavoidable.⁴ Different actionable words spoken at different times constitute several and distinct causes of action, and should be embodied in separate counts.⁵ If the complaint states that the publication was a libel, it is unnecessary to aver that it is false and malicious,⁶ or without probable cause.⁷ It is sufficient to allege that the words are false and malicious, without laying a *scienter*, even when the words were part of a privileged communication.⁸ It is not necessary to set forth an imputation of crime with the particularity necessary in an indictment for the offense.⁹ In a declaration for slander in charging the plaintiff with perjury in another state, it must be averred that by the laws of such other state perjury is an offense to which is annexed an infamous punishment.¹⁰ But in an action for words imputing an offense criminal by statute only, the statute need not be referred to.¹¹ In an action of slander in which it is alleged that the defendant accused the plaintiff of killing a particular person, it is necessary to allege that such person is dead.¹²

¹ Weir v. Hoss, 6 Ala. 881; Blethen v. Stewart, Minn. 1889.

² Kerschbaugher v. Slusser, 12 Ind. 453; Wormouth v. Cramer, 3 Wend. 394; K—— v. H——, 20 Wis. 239; 91 Am. Dec. 397.

³ Hunt v. Bennett, 4 E. D. Smith, 647.

⁴ Ellis v. Kimball, 16 Pick. 132.

⁵ Patterson v. Wilkinson, 55 Me. 42; 92 Am. Dec. 568.

⁶ Hunt v. Bennett, 19 N. Y. 173.

⁷ Purdy v. Carpenter, 6 How. Pr. 361.

⁸ Andrew v. Deshler, 43 N. J. L. 16.

⁹ Thompson v. Barkley, 27 Pa. St. 263; Miller v. Miller, 8 Johns. 74.

¹⁰ Sparrow v. Maynard, 8 Jones, 195.

¹¹ Elam v. Badger, 23 Ill. 498.

¹² Chandler v. Holloway, 4 Port. 17. *Contra*, Stallings v. Newman, 26 Ala. 300; 62 Am. Dec. 723; Tenney v. Clement, 10 N. H. 52.

The complaint must allege that the slanderous words were spoken, uttered, or published by the defendant,¹ and in the presence of third persons.² But it is not necessary to aver in the declaration the name of the person to whom, or in whose presence, they were spoken.³ The time of speaking the words is not material.⁴ An allegation that the defendant published concerning the plaintiff, in a newspaper, etc., a certain article containing the false and defamatory matter following (setting out the article in full) is sufficient, without alleging that each part of the article was concerning the plaintiff.⁵ A plaintiff may, in the same count, charge words not actionable *per se* with words actionable in themselves in aggravation of damages.⁶

Evidence of special damage cannot be given in an action of slander, unless it is alleged in the declaration.⁷ "It is necessary that the declaration should set forth precisely in what way such special damage resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered special damages or that he has been put to great costs and expenses thereby."⁸ And where the plaintiff alleges loss of custom or profits, or the like, as his special damage, it is not sufficient to allege this generally, but the particular instances and the particular persons must be named. Thus it was held insufficient where the plaintiff alleged that by reason of the slander she "lost several suitors."⁹ So where plaintiff alleged that the defendant's words had "injured her in

¹ *Watts v. Morgan*, 50 Ind. 318; *Roberts v. Lovell*, 38 Wis. 211.

² *Frank v. Kaminsky*, 109 Ill. 26. But a count charging that the defendant "published" a slanderous charge concerning the plaintiff is sufficient, without averring specially the presence of others: *Burton v. Burton*, 3 G. Greene, 316.

³ *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489.

⁴ *Hosley v. Brooks*, 20 Ill. 115; 71 Am. Dec. 252.

⁵ *Carson v. Mills*, 69 N. C. 122.

⁶ *Dioyt v. Tanner*, 20 Wend. 190.

⁷ *Bostwick v. Nicholson*, Kirby, 65; *Bostwick v. Hawley*, Kirby, 290; *Shipman v. Burrows*, 1 Hall, 399; *Harcourt v. Harrison*, 1 Hall, 474; *Dicken v. Shepherd*, 22 Md. 399; *Herrick v. Lapham*, 10 Johns. 281; *Bassell v. Elmore*, 48 N. Y. 561.

⁸ *Cook v. Cook*, 100 Mass. 194.

⁹ *Barnes v. Prudlin*, 1 Sid. 376.

her good name, and caused her relatives and friends to slight and shun her.”¹ So where the allegation was merely that by reason of defendant’s words “the plaintiff had been slighted, neglected, and misused by the neighbors and her former associates, and turned out of doors.”² But where words are spoken of the plaintiff in the way of his profession or trade so as to be actionable *per se*, the plaintiff may allege and prove a general diminution of profits or decline of trade, without naming particular customers or proving they have ceased to deal with him.³

Under the general issue, the truth of the words cannot be given in evidence in mitigation. It should be pleaded in bar.⁴ But anything short of a justification he may thus prove.⁵ A mere statement that the words are true is insufficient under the code system as a justification; it should state the facts which go to constitute the crime or offense imputed, so that an issue of either law or fact may be framed.⁶ The general issue is abolished under the code system of pleading, and a defendant cannot under a denial show that alleged slanderous words were not maliciously spoken or did not amount to slander; but in such case he must state the circumstances under which

¹ Bassell v. Elmore, 48 N. Y. 563; 65 Barb. 627.

² Pettibone v. Simpson, 66 Barb. 492.

³ Trenton etc. Ins. Co. v. Perrine, 23 N. J. L. 402; 57 Am. Dec. 400; Weiss v. Whittemore, 28 Mich. 366; Evans v. Harris, 1 Hurl. & N. 251; Ashley v. Harrison, 1 Esp. 48; Peake, 256; Ingram v. Lawson, 6 Bing. N. C. 212; 8 Scott, 471; 4 Jur. 151; 9 Car. & P. 326; Harrison v. Pearce, 1 Fost. & F. 569; Broad v. Deuster, 8 Biss. 265; Evans v. Harries, 26 L. J. Ex. 32, Martin, B., saying: “Suppose a biscuit-baker in Regent Street is slandered by a man saying his biscuits are poisoned, and in consequence no one enters his shop. He cannot complain of the loss of any particular

customers, for he does not know them; and how hard and unjust it would be if he could not prove the fact of the loss under a general allegation of loss of custom.”

⁴ Bailey v. Hyde, 3 Conn. 463; 8 Am. Dec. 202; Swift v. Dickerman, 31 Conn. 291; Treat v. Browning, 4 Conn. 408; 10 Am. Dec. 156. The general issue admits plaintiff’s innocence of the charge: Sheahan v. Collins, 20 Ill. 325; 71 Am. Dec. 271.

⁵ Id.; and Wormouth v. Cramer, 3 Wend. 395; 20 Am. Dec. 706; Gilman v. Lowell, 8 Wend. 573; 24 Am. Dec. 96; Hart v. Reed, 1 B. Mon. 166; 35 Am. Dec. 179.

⁶ Atteberry v. Powell, 29 Mo. 429; 77 Am. Dec. 579.

they were spoken, in order to show absence of malice.¹ It has been held in Massachusetts that a plea of justification is admissible to prove the speaking of the words, though the plea has been adjudged bad on demurrer, and the defendant has also pleaded the general issue.² But this rule is disapproved elsewhere.³ A plea of justification to an action of slander need not allege the truth of the exact words charged.⁴ The two defenses that defendant did not use the language, and that such language is true, are not inconsistent.⁵ A defendant in slander may both deny and justify the words charged. And he cannot be compelled to elect between the two defenses.⁶ But it is otherwise where the statute requires the pleadings to be verified.⁷

ILLUSTRATIONS. — A declaration averred that in consequence of defendant's testimony that plaintiff's character for truthfulness was bad, the plaintiff had been compelled to pay a large sum in costs, but which did not show how he had been compelled. *Held*, insufficient: *Cook v. Cook*, 100 Mass. 194. In an action for libel charging that the plaintiff's opera-house was an unfit resort for respectable people, and that it was frequented by disreputable and immoral persons, the defendant justified in his answer by reiterating such statement, without designating the persons referred to. *Held*, that the answer was not demurrable: *Maretzek v. Cauldwell*, 2 Robt. 715. A charitable corporation brought an action for libel, and alleged that by reason of the libel persons had refused to make donations to it. *Held*, that a bill of particulars stating the names of such persons was properly ordered: *New York Infant Asylum v. Roosevelt*, 35 Hun, 501.

¹ *Atteberry v. Powell*, 29 Mo. 429; 77 Am. Dec. 579.

² *Alderman v. French*, 1 Pick. 1; 11 Am. Dec. 114; *Hix v. Drury*, 5 Pick. 296. This rule was abolished afterwards by statute in that state: See *Whitaker v. Freeman*, 1 Dev. 270; and see *Butler v. Kaulback*, 8 Kan. 668; *Miller v. Larsen*, 17 Wis. 624; *Sexton v. Rhames*, 13 Wis. 99; *Hartwell v. Page*, 14 Wis. 49.

³ *Whitaker v. Freeman*, 1 Dev. 270; *Dorr v. Jones*, 5 How. 158; *Pope v. Welsh*, 18 Ala. 631; *Starkweather v.*

Kettle, 17 Wend. 20; *Homer v. Franklin*, 7 Cow. 507; *Kimball v. Bellows*, 13 N. H. 58; *Nye v. Spencer*, 41 Me. 272; *Farnam v. Childs*, 66 Ill. 544; *Uridias v. Morrell*, 33 Cal. 92; *Mudd v. Thompson*, 34 Cal. 39; *McIntyre v. Randolph*, 50 N. H. 94; *Weston v. Tumley*, 33 Iowa, 486; *Wheeler v. Robb*, 1 Blackf. 330; 12 Am. Dec. 245.

⁴ *Coe v. Griggs*, 76 Mo. 619.

⁵ *Cole v. Woodson*, 32 Kan. 272.

⁶ *Horton v. Banner*, 6 Bush, 596.

⁷ *Atteberry v. Powell*, 29 Mo. 429; 77 Am. Dec. 579.

§ 1307. **Who may Sue.**—Damage which has resulted to A in consequence of the defendant's having defamed B is too remote to constitute special damage in any action brought by B. Whether A, who has himself suffered the damage, can sue depends upon the closeness of the relationship between A and B. If A is B's master, A may have an action on the case *per quod servitium amisit*. If A is B's husband, then the husband may sue for any special damage which has accrued to him through the defamation of his wife. But a wife cannot recover for any special damage which words spoken of her have reflected on her husband.¹ Several persons injured by the same libel must sue alone.² Partners may sue jointly for a libel defamatory of the partnership.³ And for a publication concerning a partnership which is libelous *per se*, one partner may sue alone for the injury sustained by him.⁴ But where one partner is libeled he cannot recover for any special damage which has occurred to the firm;⁵ nor if the firm is libeled the partners cannot jointly recover for any private injury to a single partner.⁶ But if insolvency be imputed to one member of a firm, this is a reflection on the credit of the firm as well, therefore, either he or the firm, or both, may sue, each for their own damages.⁷ A company or corporation can sue even one of its own members for a libel relating to its management of its business.⁸ It may maintain an action

¹ Odgers on Libel and Slander, 324; citing *Harwood v. Hardwick*, 2 Keb. 387.

² *Robinett v. McDonald*, 65 Cal. 611.

³ *Le Fanu v. Malcolmson*, 1 H. L. Cas. 637; 8 L. L. R. 418; *Haythorn v. Lawson*, 3 Car. & P. 196; *Ward v. Smith*, 6 Bing. 749; *Ludwig v. Cramer*, 53 Wis. 193.

⁴ *Rosenwald v. Hammerstein*, 12 Daly, 377.

⁵ *Solomons v. Medex*, 1 Stark. 691; *Robinson v. Marchant*, 7 Q. B. 918.

⁶ *Haythorn v. Lawson*, 3 Car. & P.

196; *Le Fanu v. Malcolmson*, 1 H. L. Cas. 637.

⁷ *Harrison v. Bevington*, 8 Car. & P. 708; *Forster v. Lawson*, 3 Bing. 452; 11 Moore, 360. Where a firm is injured by the speaking of slanderous words against one of its members, it is necessary that the plaintiff's interest should be specially averred, and special damage must be alleged: *Havemeyer v. Fuller*, 60 How. Pr. 316.

⁸ *Williams v. Beaumont*, 10 Bing. 260; 3 Moore & S. 705; *Metropolitan Omnibus Co. v. Hawkins*, 4 Hurl. & N. 87; 28 L. J. Ex. 201.

for libel for words published of it in the way of its trade or business, or of its property and concerns, or of its officers, servants, or members, by reason of which special damage is sustained by the corporation.¹ A corporation "could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption; for a corporation cannot be guilty of corruption, although the individuals composing it may be."² And it has been doubted whether the comity by which a foreign corporation is permitted to bring suit upon its contracts should be so far extended as to permit a suit for libel.³ A married woman may sue for a libel or slander against herself.⁴ Under a statute securing to married women the enjoyment of their separate property as if sole, and enabling them to sue in relation thereto, an action of slander for words spoken against the wife before her marriage must be brought in the names of both husband and wife.⁵ The action will not abate by the death of the defendant after judgment and pending an appeal. But should the case be reversed on appeal, the action would abate.⁶

§ 1308. **Law and Fact.**—Libel or no libel in the particular case is a mixed question of law and fact.⁷ As to what is the meaning of the words, what was their application, in what sense were they used by the defendant and understood by the hearers, and to whom were they

¹ Trenton etc. Insurance Co. v. Per-
rine, 23 N. J. L. 402; 57 Am. Dec. 400.

² Per Pollock, C. B., in *Metropol-
itan Omnibus Co. v. Hawkins*, 4
Hurl. & N. 90.

³ Hahnemannian Life Insurance Co.
v. Beebe, 48 Ill. 87; 95 Am. Dec. 519.

⁴ See *ante*, Title IV., Husband and
Wife. Whether or not a wife can
bring libel against her husband, it is
no defense to one who has maliciously
published and paid for an advertise-
ment defaming his daughter-in-law
that the advertisement was written by
plaintiff's husband, who requested his

father to publish it: *Smith v. Smith*,
Mich. 1889.

⁵ *Gibson v. Gibson*, 43 Wis. 23; 28
Am. Rep. 527.

⁶ *Akers v. Akers*, 84 Tenn. 7.

⁷ *Goodrich v. Woolcott*, 3 Cow. 231;
Cook v. Bostwick, 12 Wend. 48; *Laine
v. Wells*, 7 Wend. 175; *McKinley v.
Rit*, 20 Johns. 355; *Welsh v. Eakle*,
7 J. J. Marsh. 424; *Jones v. Rivers*, 3
Brev. 95. When the language charged
to be libelous is unambiguous, the
question of libel or no libel is for the
court: *Donaghue v. Gaffy*, 54 Conn.
257.

intended to refer, these are questions of fact to be decided by the jury.¹ So the question of malice is for the jury;² or whether or not the words were spoken of the plaintiff in the way of his business;³ or whether the publication is a true and correct narrative of *quasi* judicial proceedings before a public body which may lawfully be published.⁴ When words charged are susceptible of twofold meaning, one imputing a felony, and the other a trespass only, it is the province of the jury to determine from the circumstances in what sense they were uttered and understood.⁵ Whether the act charged amounts to a crime, or whether

¹ *Dolloway v. Turrill*, 26 Wend. 393; *Miller v. Maxwell*, 16 Wend. 15; *Lewis v. Chapman*, 16 N. Y. 371; *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Smart v. Blanchard*, 42 N. H. 146; *Dexter v. Taber*, 12 Johns. 239; *Usher v. Severance*, 20 Me. 9; 37 Am. Dec. 33; *St. Martin v. Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494; *Welsh v. Eakle*, 7 J. J. Marsh. 424; *Dumell v. Fiske*, 11 Met. 551; *Smith v. Miles*, 15 Vt. 245; *Jones v. Rivers*, 3 Brev. 95; *Thompson v. Grimes*, 5 Ind. 385; *Cregier v. Bunton*, 2 Rich. 395; *Hawkins v. N. Y. Printing Co.*, 29 La. Ann. 134; *Edwards v. Chandler*, 14 Mich. 471; 90 Am. Dec. 249. When the language charged to be libelous is susceptible of different constructions, it is a question for the jury whether or not it is libelous: *Thompson v. Powning*, 15 Nev. 195.

² *Bunton v. Worley*, 4 Bibb, 38; 7 Am. Dec. 735; *Jarvis v. Hatheway*, 3 Johns. 180; 3 Am. Dec. 473; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228; *Trabue v. Mays*, 3 Dana, 138; 28 Am. Dec. 61; *Lancey v. Bryant*, 30 Me. 466. Whether or not the publication complained of is libelous is to be determined by the jury: *Beazley v. Reid*, 68 Ga. 380; *Woodling v. Knickerbocker*, 31 Minn. 268. It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that it can rule as a matter of law that the publication is not libelous, and withdraw the case from the jury or order a verdict for

the defendant: *Twombly v. Monroe*, 136 Mass. 464. In California it is held that it is for the court to determine whether or not the language will bear a double meaning, one of which is libelous; and when it has determined that it will bear such meaning, it is for the jury to determine in which it was used: *Van Vactor v. Walkup*, 46 Cal. 124. In libel the meaning of the words used is part of the intention, and is therefore to be found by the jury: *Morrell v. Frith*, 3 Mees. & W. 402. In England it is held that the question whether or not a publication is capable of a defamatory meaning is a question of law for the court, and if it finds that it is not, it should withdraw the case from the jury: *Mulligan v. Cole*, L. R. 10 Q. B. 549; *Hunt v. Goodlake*, 43 L. J. Com. P., N. S., 54; *Capital and Counties Bank v. Henty*, L. R. 7 App. Cas. 741. But where the publication is reasonably susceptible of a construction that would make it libelous, its meaning ought to be submitted to the jury: *Hart v. Wall*, L. R. 2 Com. P. Div. 146. In Maryland, however, it is settled that in a civil action the question whether a publication is libelous or not is a question of law for the court: *Negley v. Farpow*, 60 Md. 158; 45 Am. Rep. 715.

³ *Ramsdale v. Greenacre*, 1 Fost. & F. 61.

⁴ *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479.

⁵ *Dedway v. Powell*, 4 Bush, 77; 96 Am. Dec. 283.

the words are or are not libelous and actionable, is a question of law for the court.¹ Whether it is a privileged communication is for the court.² The jury cannot decide whether a libel was published on a justifiable occasion, without being told by the court what facts would constitute such an occasion.³ It is not error to charge the jury that there is no evidence of express malice, although there may be slight evidence, but not sufficient to sustain a verdict.⁴ In an action for libel it is not improper for the court to inform the jury of the amount of damages which would carry costs.⁵

¹ *Dexter v. Taber*, 12 Johns. 239; 715; *Bourreseau v. Detroit etc. Co.*, 63 Hume v. Arrasmith, 1 Bibb, 165; 4 Mich. 425; 6 Am. St. Rep. 320.
² *Jellison v. Goodwin*, 43 Me. 287; 69 Am. Dec. 62; *Byam v. Collins*, 111 Am. Dec. 122; *Rice v. Simmons*, 2 Harr. (Del.) 417; 31 Am. N. Y. 143; 7 Am. St. Rep. 726.
³ *Duncan v. Brown*, 15 B. Mon. Dec. 766; *Snyder v. Andrews*, 6 Barb. 43; *Pittock v. O'Neill*, 63 Pa. St. 253; 186.
⁴ *Remington v. Congdon*, 2 Pick. 310; 13 Am. Dec. 431.
⁵ *Steketee v. Kimm*, 48 Mich. 322.

DIVISION III.
PROPERTY RIGHTS AND REMEDIES.

TITLE XVI.

PERSONAL PROPERTY IN GENERAL.

TITLE XVI.

PERSONAL PROPERTY IN GENERAL.

CHAPTER LXIX.

TITLE TO PERSONAL PROPERTY.

- § 1309. Title by original occupancy.
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§ 1309. Title by Original Occupancy. — Title to chattels by occupancy arises where one takes possession of such articles of personal property as have not been previously appropriated by any one. The common law has not occupied itself much with this kind of title to personalty. The code of Louisiana provides: "There are five ways of acquiring property by occupancy, viz., by hunting, by fowling, by fishing, by finding, by captures from the enemy. Wild beasts, birds, and all the animals which are bred in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly the property of the captor. . . . And it is not material whether they are taken by a man upon his own ground or upon the ground of another. But the proprietor of a tract of land may forbid any person from entering for the purpose of hunting thereon. . . . Those who discover or who find precious stones, pearls, and other things of that kind on the sea-shore or other places where it is lawful to search for and take them become masters of them."¹ And this is likewise the common law of the subject.

§ 1310. Abandoned and Derelict Property. — Where an owner of property throws it away with the intention of abandoning it, the person who first takes possession of it obtains a complete title.² But abandonment happens as a rule only in those cases where the thing is of little or no value to the owner; as, for example, old clothing, boxes, junk of all kinds, ashes, slops, and refuse which are cast aside by the owner as worthless. In a Connecticut case, the horses of a number of persons on the highway had dropped a quantity of manure which the plaintiff afterwards gathered into heaps to remove to his

¹ Code Louisiana, secs. 3412 et seq.

² *Wyman v. Hurlburt*, 12 Ohio, 81; 40 Am. Dec. 461; see note to this case, 40 Am. Dec. 464-468; *McGoon v. Ankeny*, 11 Ill. 558. In *Forster v.*

Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506, Gibson, C. J., says: "In the Doctor and Student it is said that a man who has abandoned his property may at any time resume the ownership of it."

land. Before he removed it the defendant took it away. The court held that the manure was originally the property of the owners of the animals which dropped it; that it had been abandoned by them as worthless, and that the plaintiff by first taking possession of it became the owner, and could maintain trover against the defendant.¹ Soil removed from the land of one person, and placed on the land of another with his consent, and without an intention on the part of the former to reclaim it, or any agreement authorizing him to remove it, becomes a part of the land of the latter.² The owner of land is not the owner of timber floating in a stream running over his land, yet he has an exclusive right to seize such wood.³ And the transmission of financial news to subscribers by means of telegraphic printing instruments is only a qualified publication of such news, and does not forfeit the owner's right of property therein;⁴ and property cannot be held to be derelict in the hands of an officer into whose possession it has come by judicial process.⁵

¹ *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 350, the court saying: "We do not question the general doctrine that where the right by occupancy exists, it exists no longer than the party retains the actual possession of the property, or till he appropriates it to his own use by removing it to some other place. If he leaves the property at the place where it was discovered, and does nothing whatsoever to enhance its value or change its nature, his right by occupancy is unquestionably gone. But the question is, if a party finds property comparatively worthless, as the plaintiff found the property in question owing to its scattered condition upon the highway, and greatly increases its value by his labor and expense, does he lose his right if he leaves it a reasonable time to procure the means to take it away, when such means are necessary for its removal? Suppose a teamster with a load of grain, while traveling the highway, discovers a rent in one of his bags, and finds that his grain is scattered

upon the road for the distance of a mile. He considers the labor of collecting his corn of more value than the property itself, and he therefore abandons it and pursues his way. A afterwards finds the grain in this condition, and gathers it kernel by kernel into heaps by the side of the road, and leaves it a reasonable time to procure the means necessary for its removal. While he is gone for his bag, B discovers the grain thus conveniently collected in heaps, and appropriates it to his own use. Has A any remedy? If he has not, the law in this instance is open to just reproach. We think, under such circumstances, A would have a reasonable time to remove the property, and during such reasonable time his right to it would be protected."

² *Lacustrine Fertilizer Co. v. Lake Guano etc. Co.*, 82 N. Y. 476.

³ *Rogers v. Judd*, 5 Vt. 223.

⁴ *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194.

⁵ *Norton v. Nye*, 56 Me. 211.

Further, as to what is to be considered a taking possession by the first comer, to the exclusion of others: The law requires an actual taking of the property with an intention of reducing it into possession. The possession, it has been said, need not be an absolute or perpetual appropriation of the property to the use of the finder, nor need the act of taking possession be manual.¹ But it has been held that marking trees that extend across a wreck, or affixing temporary buoys to it, are not such acts as the law will protect as appropriating the property;² nor marking the position of a wreck and preparing a machine to raise her;³ nor merely chasing a wild animal;⁴ nor marking a tree in the woods in which there were bees;⁵ nor even getting the permission of the owner of the tree to take them.⁶ In order that the title to a personal chattel shall pass by operation of the statute of limitations, there must at least be some use or appropriation of it, or some act of dominion over it inconsistent with an absolute right of property in the owner, and such as would lay the foundation of an action for its recovery.⁷ One who cuts and stacks hay on uninclosed prairie owned by others, without authority, acquires no property in such hay, and cannot maintain an action for its destruction.⁸ The ownership of split stone lying upon land taken for a highway is not affected by the location; and the officers of the town have no right to use such stone in constructing the highway.⁹

Where one man's property is cast on another man's land, as, for example, where fruit is blown or falls from his trees, or logs or other property is carried by a flood,

¹ *Eads v. Brazelton*, 22 Ark. 499; 79 Am. Dec. 88.

² *Eads v. Brazelton*, 22 Ark. 499; 79 Am. Dec. 88.

³ *The Wurts*, Olcott, 469.

⁴ *Pierson v. Post*, 3 Caines, 175; 2 Am. Dec. 264; *Buster v. Newkirk*, 20 Johns. 75.

⁵ *Gillett v. Mason*, 7 Johns. 17.

⁶ *Ferguson v. Miller*, 1 Cow. 244; 13 Am. Dec. 519.

⁷ *Baker v. Chase*, 55 N. H. 61.

⁸ *Murphy v. R. R. Co.*, 55 Iowa, 473; 39 Am. Rep. 175.

⁹ *Small v. Danville*, 51 Me. 359.

and he is guilty of no negligence, he may abandon the property to the owner of such land, and in such case he is not liable for any damage which the property has caused.¹ But he has also a right to enter and reclaim his property;² but if he does, he must make good to the owner of the land any damage which he may have sustained.³ In Pennsylvania it has been laid down that in the case of property carried away by a flood, and stranded on another's land, the land-owner has a right after notice to disencumber his land and cast the property back into the stream.⁴ Property on the body of a drowned man washed ashore from a shipwreck is not derelict, but goes to his personal representative.⁵

Where derelict, or property which has been carried away by flood, etc., is saved, the rescuer has a right to be paid his reasonable costs and expenses incurred thereby.⁶ But he has no lien for this. He must deliver up the property on demand, and his only remedy is an action against the owner.⁷ Within the admiralty jurisdiction the preserver of property has a lien on it for his services.⁸

¹ *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569.

² *Proctor v. Adams*, 113 Mass. 377; 18 Am. Rep. 500; *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569; *Gould on Waters*, 102; *Carter v. Thurston*, 58 N. H. 104; 42 Am. Rep. 584; *Hetfield v. Baum*, 13 Ired. 394; 57 Am. Dec. 563; *Brown v. Chadbourne*, 31 Me. 9; 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 563; 66 Am. Dec. 298.

³ *Sheldon v. Sherman*, 42 N. Y. 484; 1 Am. Rep. 569; *Chase v. Corcoran*, 106 Mass. 286. But in other cases it has been held that where the owner has not been guilty of negligence, the land-owner has no claim for injury to his property, but that the former may enter and reclaim it without paying compensation: *Forster v. Juniata Bridge Co.*, 16 Pa. St. 393; 55 Am. Dec. 506; *Livezey v. Philadelphia*, 64 Pa. St. 106; 3 Am. Rep. 578.

⁴ *Forster v. Juniata Bridge Co.*, 16

Pa. St. 393; 55 Am. Dec. 506; *Livezey v. Philadelphia*, 64 Pa. St. 106; 3 Am. Rep. 578. Doing as little harm to it as possible: *Berry v. Carle*, 3 Me. 269.

⁵ *Wonson v. Sayward*, 13 Pick. 402; 23 Am. Dec. 691.

⁶ *Tome v. Cribs of Lumber, Taney*, 553; *Tome v. Dubois*, 6 Wall. 548; *Winslow v. Walker*, 1 Hayw. 193; *Reeder v. Anderson*, 4 Dana, 193.

⁷ *Baker v. Hoag*, 7 N. Y. 555; 59 Am. Dec. 431; *Tome v. Cribs of Lumber, Taney*, 553; *Nicholson v. Chapman*, 2 H. Black. 254.

⁸ *Baker v. Hoag*, 7 N. Y. 555; 59 Am. Dec. 431. In *Story on Bailments*, sec. 622, it is said: "Whenever upon the high seas, or on the sea-coast, or elsewhere within the admiralty and maritime jurisdiction (which is ordinarily limited to places within the ebb and flow of the tide), any services are rendered by persons not composing the ship's crew to ships in distress, by saving them or their car-

ILLUSTRATIONS.—Logs belonging to A, secured in a river which was a public way for floating logs, were washed by an unusual freshet onto the land of B, where A suffered them to remain for nine months, when he reclaimed them. *Held*, that A was not liable to B for damages caused by the mere lodgment of the logs on the latter's land, but was so for suffering them to remain there beyond a reasonable time: *Sheldon v. Sherman*, 42 Barb. 368. Plaintiff bought a piece of land on which were lying some split stones, the property of the defendant. For more than six years the stones were not moved by either party, and no claim of ownership in them was asserted by either to the other. *Held*, that the title to the stones did not pass to the plaintiff by virtue of the statute of limitations: *Baker v. Chase*, 55 N. H. 61. The owner of a tannery sold it and accidentally omitted to remove a few hides from the vats. Many years afterward a laborer found them. *Held*, that they belonged to the original owner or his representatives: *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600. Plaintiff, under a license of the owner of the soil to search for tin ore, made excavations in the soil. Defendant carted away some of the soil, plaintiff not having abandoned his right to search the soil thrown out for ore. *Held*, that plaintiff had, as against defendant, possessory title to the mass thrown out: *Northam v. Bowden*, 11 Ex. 70; 24 L. J. Ex. 237. Various quantities of tallow, the property of different persons, were deposited in warehouses on the bank of the Thames. A fire took place, in consequence of which the tallow melted and flowed down into the sewers, and thence into the river, from whence several portions of it were unwarrantably taken by different persons. A, one of those persons, sold some of it to B, which was taken from him by the police, and sold, under statutory authority, by them to C. *Held*, that A had no property in the tallow entitling him to maintain an action against C for its conversion: *Buckley v. Gross*, 3 Best & S. 566; 32 L. J. Q. B. 129.

§ 1311. **Waifs and Treasure-trove.** — Waifs are stolen goods which the thief in fleeing throws away. At

goes from impending perils and losses, or by recovering them after they have been lost, or by bringing them in and preserving them when found derelict, in order to have them restored to the rightful owners, such persons are denominated salvors; and they are entitled to a compensation for their services, which is known by the name of salvage. As soon as they take possession of the property for the purpose

of preserving it, as, for example, if they find a ship in distress, and take possession with the assent of the master or other persons in possession, in all such cases they are deemed *bona fide* possessors, and their possession cannot be lawfully displaced by any third persons. They have a lien on the property saved for their salvage which the laws of all maritime countries will respect and enforce."

common law they became the property of the king. In this country the authorities of the law take possession of such things and hold them in trust for the true owner on establishing his right.¹ Money in the possession of a prisoner at the time of his arrest cannot be appropriated by officers who have him in charge; and, although taken from him at the time of his arrest, is still his property and subject to his order.² The private household goods of a criminal are not affected by the crimes and misconduct of the owner; and such property cannot be destroyed or taken except by due process of law.³ Where money, plate, or works of art, or articles of value, are found hidden in the earth, they are called treasure-trove. They become the property of the owner, if he can be found. If the owner cannot be found, the property goes, in England, to the crown; it is even a criminal offense to conceal the discovery from the officers of the law. In most of the United States, the legislature has vested treasure-trove in the state as *bona vacantia*.⁴

§ 1312. **Wrecks and Abandoned Vessels.**—By the English common law, wrecks—that is, ships or vessels and their cargoes cast upon the shore—became the property of the crown. The statute of Edward I. gave the owner a year and a day in which to make his claim to the property. The same was the rule as to ships and property abandoned at sea. By our statutes, state and federal, abandoned maritime property, and also wrecks, vest in the government, with a right to the owner to reclaim within a certain time, subject to the payment of salvage to the finder or rescuer.⁵ In Massachusetts, it has been held that a wreck cast on the shore belongs to the owner of

¹ 2 Schouler on Personal Property, sec. 9.

² *Rickers v. Simcox*, 1 Utah, 33.

³ *Conway v. Clinton*, 1 Utah, 215; *Rickers v. Simcox*, 1 Utah, 33.

⁴ 2 Schouler on Personal Property, sec. 10.

⁵ 2 Kent's Com. 321; *Hetfield v. Baum*, 13 Ired. 394; 57 Am. Dec. 563.

the shore, against every one but the true owner. He may bring trespass against a stranger who takes it away.¹ But one who enters land to rescue a boat and restore it to the owner is not a trespasser.² One purchasing a wreck at a commissioners' sale is not guilty of trespass in hauling the goods over another's land, although forbidden to do so, where the goods could not be taken off in any other way without great inconvenience.³ If a vessel, by unavoidable accident, sinks, the owner may abandon it, and is not liable for any injury which it may afterwards cause by becoming an obstruction. He is not obliged to remove the wreck, or to give notice of its position by placing a light there.⁴ But the rule appears to be different where the sinking of his vessel was due to negligence, or where the owner does not abandon her, but stays by the vessel for the purpose of recovering her, if possible.⁵

§ 1313. Lost Property — Rights and Liabilities of Finders of Property. — The finder of lost property is entitled to retain it, as against all persons except the true owner.⁶ Thus it has been held that he so far stands in the place of the true owner that he may recover it from a second finder, he, the first finder, having afterwards lost it himself.⁷ The finder's title is good, even as against one in

¹ *Barker v. Bates*, 13 Pick. 255; 23 Am. Dec. 678; *Proctor v. Adams*, 113 Mass. 377; 18 Am. Rep. 500.

² *Proctor v. Adams*, 113 Mass. 377; 18 Am. Rep. 500.

³ *Hetfield v. Baum*, 13 Ired. 394; 57 Am. Dec. 563.

⁴ *Gould on Waters*, sec. 98; *The Swan*, 3 Blatchf. 285; *Hancock v. R. R. Co.*, 10 Com. B. 348; *Winpenny v. Philadelphia*, 65 Pa. St. 135.

⁵ *Boston etc. Co. v. Munson*, 117 Mass. 34.

⁶ *Armory v. Delamirie*, 1 Strange, 504; *McAvoy v. Medina*, 11 Allen, 548; 87 Am. Dec. 733; *McLaughlin v. Waite*, 9 Cow. 670; 5 Wend. 404; 21 Am. Dec. 232; *Pinkham v. Gear*, 3 N. H. 484; *Poole v. Symonds*, 1 N.

H. 289; 8 Am. Dec. 71; *Brandon v. Bank*, 1 Stew. 320; 18 Am. Dec. 48; *Lawrence v. Buck*, 62 Me. 275; *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380; *Durfee v. Jones*, 11 R. I. 588; 23 Am. Rep. 529; *Matthews v. Harshell*, 1 E. D. Smith, 393.

⁷ *Clark v. Maloney*, 3 Harr. (Del.) 68. The finder or other person casually coming to the possession of a public document, paper, or record gains no such property in it as to authorize him to estimate its value to one having an interest in it, and to withhold the same from the rightful owner or lawful custodian until the estimated sum is paid; *De la O. v. Acoma*, 1 N. Mex. 226.

whose house or on whose premises the lost article may be at the time. Thus the finder was held entitled to recover where he was the conductor or brakeman of a train, and the article was found by him in the car, where it had been left by a passenger, but the railroad company claimed it;¹ so where a customer found a purse on a shop-floor, and the shopkeeper claimed it.² So an unmarked saw-log carried down stream, lodged in a drift, and unreclaimed for two years, is lost property, and a former finder is entitled to it as against the riparian owner.³ For labor and expenses bestowed by the finder upon the property, it has been held that he may recover of the owner;⁴ and for his necessary and reasonable expenses incurred on account of the property, it seems agreed that he may recover.⁵ But he is entitled to no other reward, unless the owner has expressly offered one.⁶ Where a reward is offered by the owner for the recovery of the lost article, the finder has a lien on it, and may retain the article until the reward is paid.⁷ The finder is bound to take reasonable care of the property. A finder of stray horses which died while he was using them in his business was held liable to the owner for their value.⁸ The finder has a right to call upon a person who claims to be the owner to identify them; and to refuse to deliver them, when he is not satisfied of the party's title, is not a conversion.⁹ By the statutes of some states, the finder is required to advertise for the owner, and if the latter does not appear within a certain time, the thing is sold, and the proceeds, or a part thereof,

¹ New York and Harlem R. R. Co. v. Haws, 56 N. Y. 175; Tatum v. Sharpless, 6 Phila. 18.

² Bridges v. Hawkesworth, 7 Eng. L. & Eq. 424.

³ Deaderick v. Oulds, 86 Tenn. 14.

⁴ Reeder v. Anderson, 4 Dana, 193.

⁵ Etter v. Edwards, 4 Watts, 63; Amory v. Flynn, 10 Johns. 102; 6 Am. Dec. 316; Chase v. Corcoran, 106 Mass. 286.

⁶ Amory v. Flynn, 10 Johns. 102; 6

Am. Dec. 316; Watts v. Ward, 1 Or. 86; 62 Am. Dec. 299.

⁷ Wentworth v. Day, 3 Met. 352; 37 Am. Dec. 145; Preston v. Neale, 12 Gray, 122; Cummings v. Gann, 52 Pa. St. 484; Wilson v. Guyton, 8 Gill, 213; Barber v. Hoag, 3 Barb. 203; Vale v. Durant, 7 Allen, 409; Wood v. Pierson, 45 Mich. 313.

⁸ Watts v. Ward, 1 Or. 86; 62 Am. Dec. 299.

⁹ Wood v. Pierson, 45 Mich. 313.

given to the finder, the balance going to the state or municipality.

ILLUSTRATIONS. — Plaintiff, while in defendant's shop on business, picked up from the floor a parcel containing bank notes. He gave them to defendant for the owner, if he could be found. The owner could not be found. *Held*, that plaintiff, as finder, was entitled to them, as against the defendant as owner of the shop in which they were found: *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424. A bought an old safe, and afterwards offered it to B, who refused to purchase it. It was then left with B for sale, B having permission to use it. B found between the outer casing and the lining a roll of bank bills belonging to some person unknown, whereupon A first demanded the money, and then demanded the safe and its contents as they were when B received them. The safe was returned, but the money retained by B. *Held*, that, as against A, B was entitled to retain the money: *Durfee v. Jones*, 11 R. I. 588; 23 Am. Rep. 529. Plaintiff, while engaged as an employee in the defendant's paper-mill, in assorting a bale of old papers which the defendant had bought for manufacture, found a number of bank notes, in a clean unmarked envelope, in a bale, and delivered them to the defendant for the purpose of ascertaining if they were good, and upon his promise to return them. The defendant refused to return them upon demand. *Held*, that plaintiff was entitled to recover their value from him: *Bowen v. Sullivan*, 62 Ind. 281; 30 Am. Rep. 172. A servant in a hotel found a roll of bank notes in the public parlor, and informed her master, who suggested that it belonged to a transient guest, and received the money from her to give to him. It proved not to belong to the guest, and the servant demanded it from the master, who refused to return it. *Held*, that she could recover it from him: *Hamaker v. Blanchard*, 90 Pa. St. 377; 35 Am. Rep. 664.

§ 1314. **What is and is not Lost Property.**—Articles left by strangers or customers in a shop or other place of business, where it is probable they will return and claim them, are not considered as lost within the rule stated in the previous section.¹ But things accident-

¹ *Lawrence v. State*, 1 Humph. 228; 34 Am. Dec. 644; *McAvoy v. Medina*, 11 Allen, 548; 87 Am. Dec. 733. "To discover an article voluntarily laid down by the owner within a banking house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article"; *Kincaid v. Eaton*, 98 Mass. 139. But see *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424.

ally dropped in any public place, or in the streets or other thoroughfare, are lost articles within the rule. So where a thing is left in a railroad-car.¹

§ 1315. **Title by Accession.**—Accession is where a thing which belongs to one person becomes the property of some one else by reason of its becoming added to or incorporated with a thing belonging to the latter.² Where the materials of several persons are combined in one article, the property in the resulting thing is in the owner of the principal materials which went to make up the whole.³ The owner of the principal materials of an article manufactured by another, who also supplied some slight deficiencies in the materials, is the owner of the manufactured article, but the manufacturer has a lien thereon for his services and materials.⁴ This is sometimes called artificial accession, to distinguish it from natural accession. Natural accession is the addition which may be made to a thing by the forces of nature. Examples of this are found in the addition to land by the receding of a river or other water, called accretion and alluvion; the natural increase of animals by breeding; the growth of a tree or the fruit on it; the production of ice on a pond by the frost. These natural accessions belong in almost all cases to the owner of the principal thing to or on which they come.⁵

¹ *Tatum v. Sharpless*, 6 Phila. 18; *New York and Harlem R. R. Co. v. Haws*, 56 N. Y. 175.

² *Merritt v. Johnson*, 7 Johns. 473; 5 Am. Dec. 289; *Lampton v. Preston*, 1 J. J. Marsh. 454; 19 Am. Dec. 104. See note to *Baker v. Wheeler*, 8 Wend. 505, in 24 Am. Dec. 70–88; *Pulcifer v. Page*, 32 Me. 404; 54 Am. Dec. 582. See note in 54 Am. Dec. 583–597. Building a rail fence on another's land vests the rails in the owner of the land: *Wentz v. Fincher*, 12 Ired. 297; 55 Am. Dec. 416.

³ *Pulcifer v. Page*, 32 Me. 404; 54 Am. Dec. 582; *Babcock v. Gill*, 10 Johns. 287; *Worth v. Northam*, 4 Ired.

102; *Eaton v. Lynde*, 15 Mass. 242; *Gregory v. Stryker*, 2 Denio, 628; *Stephens v. Briggs*, 5 Pick. 177.

⁴ *Dunn v. O'Neal*, 1 Sneed, 106; 60 Am. Dec. 140.

⁵ Thus a tree belongs to the owner of the land in which the root is; fruit on a tree to the owner of the tree: *Waterman v. Soper*, 1 Ld. Raym. 737; even where the limbs may overhang the land of another: *Hoffman v. Armstrong*, 46 Barb. 337; young animals to the owner of the female: See *post*, Title Animals; ice to the owner of the water on which it is formed: *Higgins v. Custerer*, 41 Mich. 318; crops belong to the owner of the land on which

§ 1316. **Where Defendant is a Trespasser.** — A trespasser or other wrong-doer who takes the property of another, and changes or improves it by his labor or skill, or by adding to it new materials of his own, cannot acquire any title to the improved chattel, even to what he has added, and the original owner may recover it from him in its improved state, or he may sue for its improved value in an action for damages.¹ A trespasser who cuts grass growing on land is not, as to the owner of the land, the owner of the hay made from the grass, and cannot recover for its destruction by the owner's negligence.² Where wood has been converted and made into coal by the defendant, the owner is entitled to maintain trover for the coal.³ No trespass is committed in the owner taking possession of the frame of a boat which had been made from his timber by a trespasser.⁴

ILLUSTRATIONS. — A trespasser took A's corn, and afterward manufactured it into whisky. *Held*, that A was entitled to recover the whisky from the trespasser: *Silisbury v. McCoon*, 3 N. Y. 383; 53 Am. Dec. 307. A trespasser took and cut down B's trees, and made them into shingles. *Held*, that B could re-

they grow: *Reilly v. Reyland*, 39 Iowa, 106; *Freeman v. McLennan*, 26 Kan. 151; plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee by accession: *Bryant v. Pennell*, 61 Me. 108; 14 Am. Rep. 550; a dividend earned, but not declared, before a transfer belongs to the owner of the stock when the dividend is declared, and not to the prior owner: *Brundage v. Brundage*, 65 Barb. 397.

¹ *Pierce v. Schenck*, 3 Hill, 28; *Pierce v. Goddard*, 22 Pick. 561; 33 Am. Dec. 764; *Eastman v. Harris*, 4 La. Ann. 193; *Mitchell v. Stetson*, 7 Cush. 439; *Riddle v. Driver*, 12 Ala. 590; *Eaton v. Munroe*, 52 Me. 63; *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332; 26 Am. Rep. 520; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 87; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cow. 95; *Rice v. Hollenbeck*, 19 Barb. 664; *Final v. Backus*, 18 Mich. 218; *Bly v. U. S.*,

4 Dill. 464. "And if the wrong-doer sell the chattel to an honest purchaser, having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give": *Silisbury v. McCoon*, 3 N. Y. 383; 53 Am. Dec. 307; overruling 6 Hill, 425; 41 Am. Dec. 753; *Heard v. James*, 49 Miss. 236; *Nesbitt v. Lumber Co.*, 21 Minn. 491; *Strubbe v. R. R. Co.*, 78 Ky. 481; 39 Am. Rep. 251.

² *Lindsay v. R. R. Co.*, 29 Minn. 411; 43 Am. Rep. 228. A trespasser who sows and gathers crops is the owner of them, even against the owner of the land: *Lindsay v. R. R. Co.*, 29 Minn. 411; 43 Am. Rep. 228.

³ *Riddle v. Driver*, 12 Ala. 590; *Betts v. Lee*, 5 Johns. 348; 4 Am. Dec. 368; *Chandler v. Edson*, 9 Johns. 362; *Curtis v. Groat*, 6 Johns. 168; 5 Am. Dec. 204; *Babcock v. Gill*, 10 Johns. 287.

⁴ *Burris v. Johnson*, 1 J. J. Marsh. 196.

cover from him the value of the shingles: *Betts v. Lee*, 5 Johns. 349; 4 Am. Dec. 368.¹

§ 1317. **Where the Defendant is not a Wrong-doer.** — But “if the chattel wrongfully taken afterwards come into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of a different species, so that its identity is destroyed, the original owner cannot reclaim it.”² So where a person by mistake, and under a *bona fide* belief of right, takes the property of another, and bestows labor on it, or increases its value, he is entitled to a recompense for its increased value.³

§ 1318. **Title by Confusion.** — Confusion of goods arises where the goods of two or more persons are so intermixed that the several parts or portions can no longer be distinguished. Here the one who has caused the confusion loses his property for his pains.⁴ But this is not true in all cases, as the succeeding sections will show, and the rule is carried no further than the necessity of the case re-

¹ So where the trees were made into posts and rails: *Snyder v. Vaux*, 2 Rawle, 423; 21 Am. Dec. 466. So where they were made into charcoal: *Curtis v. Groat*, 6 Johns. 169; 5 Am. Dec. 204.

² *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Wood v. Morewood*, 3 Q. B. 440, note; *Potter v. Mardre*, 74 N. C. 36; *Martin v. Mason*, 78 Me. 452. “Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the original occupant who wrought the change; but he is put to his action

for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place”: *Silbury v. McCoon*, 3 N. Y. 383; 53 Am. Dec. 307. As to fixtures, see Title Fixtures, *post*.

³ *Wood v. Morewood*, 3 Q. B. 440, note; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *Coleman's Appeal*, 62 Pa. St. 278; *Waters v. Stevenson*, 13 Nev. 157; 29 Am. Rep. 293; *Goller v. Felt*, 30 Cal. 481; *Winchester v. Craig*, 33 Mich. 305; *Hyde v. Cookson*, 21 Barb. 92; *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Buckley v. Buckley*, 12 Nev. 423; *Lake Shore R. R. Co. v. Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629.

⁴ *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627. In a late case in North Carolina it was ruled that the doctrine of confusion of goods does not apply to the intermixture of goods of different kinds in a store: *Queen v. Wernwag*, 97 N. C. 383.

quires. Each owner is entitled to reclaim what had before belonged to him, if the mixed articles were of equal value, or if the owner's can be distinguished and separated from the rest, and it is therefore only where the intermixture has so combined and blended the different parcels or portions that they can no longer be identified that the property cannot be recovered.¹ And where the goods mixed are of equal value, each owner may take his proportion of them, even where the admixture is fraudulent.² The owner of personal property may pursue it wherever he can trace it. Where, however, the property has been so changed in its character as to have lost its identity, it ceases to have the same legal existence, and the owner cannot pursue it against third persons.³ If the goods can be distinguished and separated, each may claim his own; if the goods are of the same nature and value, as corn, tea, etc., then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions or through whose neglect or fault occurs the wrongful mixture must bear the whole loss.⁴

§ 1319. **By Misconduct of Party.**—Where the intermixture is the result of one's misconduct, he must bear the loss. He cannot recover for his own proportion, or for any part of the intermixture, but the entire property vests in him whose right is invaded. The latter may replevy the whole, or sue in damages for its value, and is not obliged to compensate the other at all.⁵ So if one,

¹ *Smith v. Sanborn*, 72 Mass. 134; *Goodenow v. Snyder*, 3 G. Greene, 599; *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627; *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Adams v. Myers*, 1 Saw. 366; *Brakeley v. Tuttle*, 3 W. Va. 86; *Goff v. Brainerd*, 58 Vt. 468.

² *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627; *Stephenson v. Little*, 10 Mich. 441; *Sims v. Glazener*, 14 Ala. 695; 48 Am. Dec. 120.

³ *Cross v. Marston*, 17 Vt. 533; 44 Am. Dec. 353.

⁴ *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233.

⁵ *The Idaho*, 93 U. S. 575; *Ryder v. Hathaway*, 21 Pick. 298; *Stephenson v. Little*, 10 Mich. 433; *Spence v. Ins. Co.*, L. R. 3 Com. P. 427; *Jenkins v. Steanka*, 19 Wis. 126; 88 Am. Dec. 675; *Jewett v. Dringer*, 30 N. J. Eq. 291, and see note pp. 291 et seq. *Warner v. Cushman*, 31 Ill. 283; *Beach*

intending to mislead the true owner, mingles his own goods with his, he by this fraud loses his own portion of the whole.¹ Where one person adds mill-logs of his own to a pile of logs belonging to another person, and marks them in the same manner as the others are already marked, he cannot afterwards maintain replevin against such other person for such logs as he can identify to be his own.² Where a trustee or one in charge of another's property so confounds it with his own that it cannot be distinguished, he will lose it all, unless he can clearly identify his portion.³ If a third party willfully mixes or confuses with his own the goods of a debtor which have been transferred to him by such debtor, with the intent to delay, hinder, or defraud his creditors, and an attachment against such debtor is levied upon the goods so confused and mixed together, the fraudulent purchaser has the burden of identifying his own goods from those embraced by such transfer, in order to exempt the goods so owned by him from sale under the attachment.⁴

ILLUSTRATIONS. — A, having mortgaged a number of hats to B, was employed by B to sell them. A mixed them up with hats of his own, and sent the lot to D to sell. *Held*, that B was entitled to recover in trover against D all the hats: *Willard v. Rice*, 11 Met. 493; 45 Am. Dec. 226. Plaintiff cut timber on the defendants' land, and intermingled it with his own, marking it with the same mark. Defendants not being able to identify the timber cut from their land, and intending in good faith only to retake their own timber, actually took more. *Held*, that the defendants would not be liable as wrong-doers

v. Schmultz, 20 Ill. 185; *Willard v. Rice*, 11 Met. 493; 45 Am. Dec. 226; *Wingate v. Smith*, 20 Me. 287; *McDowell v. Russell*, 37 Pa. St. 164; *Adams v. Wildes*, 107 Mass. 125; *Starr v. Wingar*, 3 Hun, 491; *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Alley v. Adams*, 44 Ala. 609; *Root v. Boneman*, 22 Wis. 539; *Dillingham v. Smith*, 30 Me. 370.

¹ *Ryder v. Hathaway*, 21 Pick. 298; *Stearns v. Herrick*, 132 Mass. 114. See *Lehman v. Kelly*, 68 Ala. 192.

² *Beach v. Schmultz*, 20 Ill. 185; *Brackenridge v. Holland*, 2 Blatchf. 377; *Seavy v. Dearborn*, 19 N. H. 351; *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Wilson v. Nason*, 4 Bosw. 155; *Brakeley v. Tuttle*, 3 W. Va. 86.

³ 2 Schouler on Personal Property, 48.

⁴ *Weil v. Silverstone*, 6 Bush, 698; *Thome v. Colton*, 27 Iowa, 427.

until the plaintiff had pointed out his property and demanded it of them: *Smith v. Morrill*, 56 Me. 566. A junk-dealer, by fraudulent collusion with the employees of a railroad corporation, obtained large quantities of old iron, etc., at much less than the actual weight or value. On delivery it was thrown indiscriminately on heaps of other old iron, etc., belonging to him, so as to be indistinguishable. *Held*, that he must forfeit the whole mass to the company: *Jewett v. Dringer*, 30 N. J. Eq. 291. A sold timber to B, to be cut from A's land, and by the contract retained a lien until payment. B sold timber cut under this contract, together with other timber, to C. *Held*, that A, in enforcing his lien against C, was bound to make separation: *Foster v. Warner*, 49 Mich. 641. A person mingled his hay with that of a judgment debtor, and did not and could not identify his own. *Held*, that the mass became the property of the judgment debtor, as between the party mixing the hay and an officer levying upon the same under a writ of execution against the debtor: *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233. An owner so commingled stone quarried with that seized by a sheriff under process from a state court that that seized could not be distinguished from that since quarried. *Held*, not entitled to bring replevin in the federal court to recover the stone since quarried: *Williams v. Morrison*, 32 Fed. Rep. 177.

§ 1320. **By Consent of the Parties.**—Where the intermixture is by the consent of the parties, each owner becomes a tenant in common in proportion to his respective share of the whole mass.¹ A contract that W. shall find timber, and that T. shall manufacture it into shingles, and have three thousand five hundred of every five thousand manufactured, makes W. the owner of three tenths of the shingles, and T. of seven tenths of them; and until some division is made they become tenants in common of the shingles.² Where grain belonging to different owners is stored by a warehouseman, and is all intermingled in one common mass, accord-

¹ 2 Schouler on Personal Property, 45; Nowlen v. Colt, 6 Hill, 461; 41 Am. Dec. 756; Sims v. Glazener, 14 Ala. 695; 48 Am. Dec. 120; Inglebright v. Hammond, 19 Ohio, 337; 53 Am. Dec. 430; Dole v. Olmstead, 36

Ill. 150; 85 Am. Dec. 397; Warner v. Cushman, 31 Ill. 283; Low v. Martin, 18 Ill. 286; Adams v. Myers, 1 Saw. 306; Lansing v. Stowell, 37 How. Pr. 88; Wilson v. Naxon, 4 Bosw. 155.

² White v. Brooks, 43 N. H. 402.

ing to usage, and without objection of the owners, it becomes common property, owned by all in the proportions in which each has contributed to the common stock, and all are liable to sustain in the same proportion any loss occurring by diminution, decay, or otherwise. And so any holders of receipts for grain who have received the full amount in such case may be compelled by equity to account for the surplus over and above their ratable share.¹

ILLUSTRATIONS. — One of two tenants in common of a quantity of shot-iron took possession of the whole, mixed it with other iron so that the two lots could not be distinguished, manufactured the entire quantity, and sold the manufactured articles. *Held*, that these acts amounted to a conversion of the share of his co-tenant: *Redington v. Chase*, 44 N. H. 36; 82 Am. Dec. 189.

§ 1321. **By Mistake of Party.** — Where the confusion is the result of the party's accidental mistake or error, or even his negligence, where willfulness or fraud are wanting, he does not lose his part, but is permitted to prove his portion, and recover it.²

ILLUSTRATIONS. — In filling certain contracts for the delivery of a definite number of railroad ties of a specified quality and description, C. delivered some twenty thousand of like quality, value, and description in excess of the contracts, which D. refused to accept. Such surplus having, by the act of C., and without fault on the part of D., become so intermingled with the accepted ties belonging to D. as to be undistinguishable therefrom, *held*, that D. was entitled of right to take and use from the common lot a number equal to his proportionate share of the whole: *Chandler v. De Graff*, 25 Minn. 88.

§ 1322. **Act of Stranger.** — Where the confusion is caused by the act of a stranger, to which neither of the

¹ *Dole v. Olmstead*, 36 Ill. 150; 85 Am. Dec. 397.

² 2 Schouler on Personal Property, sec. 49; *Ryder v. Hathaway*, 21 Pick. 298; *Wetherbee v. Green*, 22 Mich. 311; 7 Am. Rep. 653; *Thome v. Colton*, 27 Iowa, 425; *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627; *Pratt v. Bryant*, 20 Vt. 333; *Moore v. Bowman*, 37 N. H. 494; *Distilled Spirits*, 11 Wall. 356; *Weymouth v. R. R. Co.*, 17 Wis. 550; 84 Am. Dec. 763; *Winchester v. Craig*, 33 Mich. 205; *Treat v. Barber*, 7 Conn. 274; *Smith v. Sanborn*, 6 Gray, 134; *Davis v. Krum*, 12 Mo. 279.

parties is privy, it seems to be now well settled that they—that is, the owners—become owners in common of the mass.¹ An owner of personal property cannot, against his will, be deprived of the title to such property by having it attached, without his consent, to the real estate of another by a third person, where such personal property can be removed from such real estate without any great inconvenience and without any substantial injury to the real estate.²

§ 1323. **Inevitable Accident or Vis Major.**—So where the confusion is the result of inevitable accident or *vis major*, the parties whose goods have become intermingled own the mass in common, each according to his share, if that can be proved; otherwise, in equal portions.³

§ 1324. **Title by Gift—Gifts Defined and Classified.**—Gifts are either *inter vivos* or *causa mortis*. A gift *inter vivos* is the ordinary gift from one person to another, or, in other words, the transfer of property without any consideration.⁴ A gift *causa mortis* is one made in expectation of death, to take effect only in the case that the donor dies. The burden of proving a gift of personal property rests on the claimant.⁵

§ 1325. **Gifts inter Vivos—What may be the Subject of.**—“All corporeal movables will pass by manual gift accompanied by delivery.”⁶ So will a chose in action, as a promissory note,⁷ or a policy of insurance.⁸ So may imperfect obligations, as the duty of a minor son to give his earnings to his father.⁹

¹ 2 Schouler on Personal Property, 50; Sims v. Glazener, 14 Ala. 695; 48 Am. Dec. 120.

² Shoemaker v. Simpson, 16 Kan. 43.

³ Moore v. R. R. Co., 7 Lans. 39; Spence v. Ins. Co., L. R. 3 Com. P. 427; Sharp v. United States, 12 Ct. of Cl. 638; Bryant v. Ware, 30 Me. 298.

⁴ Bouvier's Law Dictionary.

⁵ Lewis v. Merritt, 42 Hun, 161.

⁶ Bogan v. Finlay, 19 La. Ann. 94; Maillot v. Wesley, 11 La. Ann. 467.

⁷ Stewart v. Hidden, 13 Minn. 43; Coutant v. Schuyler, 1 Paige, 318; Bedell v. Carll, 33 N. Y. 581.

⁸ Lemon v. Ins. Co., 38 Conn. 294.

⁹ Atwood v. Holcomb, 39 Conn. 270; 12 Am. Rep. 386.

ILLUSTRATIONS.—The holder agreed to surrender to the maker a note of \$674 on payment of \$500, and did do so. *Held*, that the payment of the \$500 discharged the whole debt, and that the transaction was to be regarded as a gift of the unpaid balance: *Stewart v. Hidden*, 13 Minn. 43. Defendants having let a job to plaintiffs for a specified price, it was agreed that defendants should retain five thousand dollars thereof, which agreement was repeatedly recognized, and at length completely carried out. *Held*, that this amounted to a gift, or an abatement of the five thousand dollars from the contract price: *Butler v. Bohn*, 31 Minn. 325.

§ 1326. Subject-matter and Donee must be Definite.

—The subject-matter of a gift must be certain, definite, and capable of delivery. The certainty, however, is liberally interpreted, as where a father gave “one half of all the personal estate of which I may die possessed.”¹ So the intended donee must be in existence at the time; one cannot, without using the instrumentality of a trustee, give property to children yet to be born. “A direct gift of personalty to persons not *in esse* cannot be.”² Where a church organ is bought with funds raised by voluntary subscription, whether the property shall remain in the contributors or pass by gift to the church or society depends upon the intention of the contributors.³ On the question of whether a man made to his wife a gift of a note, he may testify to his intent.⁴

§ 1327. Unexecuted Gift—Promise to Make Gift—Revocation.—A promise to make a gift is not enforceable, for it may be revoked by the promisor at any time.⁵ So an intention to make a gift is unavailing until it is car-

¹ *Butler v. Scofield*, 4 J. J. Marsh. 139; 20 Am. Dec. 211.

² *Hall v. Thomas*, 3 Strob. 101.

³ *Downes v. Union Cong. Soc.*, 63 N. H. 151.

⁴ *Pritchard v. Hirt*, 39 Hun, 378.

⁵ *Pearson v. Pearson*, 7 Johns. 26; *Fink v. Cox*, 13 Johns. 145; 9 Am. Dec. 191; *Pitts v. Mangum*, 2 Bail.

588; *Phelps v. Bond*, 23 N. Y. 69; *Antrobus v. Smith*, 12 Ves. Jr. 39; *In re Campbell's Estate*, 7 Pa. St. 100; 47 Am. Dec. 503; *Frost v. Frost*, 33 Vt. 639; *Taylor v. Staples*, 8 R. I. 170; 5 Am. Rep. 556; *Blasdel v. Locke*, 52 N. H. 238; *Brink v. Gould*, 7 Lans. 425; *Spencer v. Vance*, 57 Mo. 437; *Bond v. Bunting*, 119 Mass. 474.

ried into effect.¹ The gift of a chattel to take effect in the future is without consideration, and not enforceable.² But a voluntary gift of personal estate by deed to take effect after death, reserving the use and possession in the donor during life, may be made without the intervention of trustees.³ A gift of a note, unsupported by any valuable consideration, may be revoked before payment.⁴ So a gift of a check on the eve of marriage by the man to the woman, not in consideration of the marriage, may be revoked.⁵ When the obligee voluntarily gave the obligor an order on his agent for the delivery of the bond which was not obeyed, it was held that the gift was incomplete, and might be revoked, and resuming possession and bringing suit was a revocation.⁶ To the general rule there are exceptions. A promise to settle upon or give property to a wife or a child has been sustained by equity when in writing and under seal.⁷ A court of equity will effectuate a gift of lands by a father to his child evidenced only by an unsealed instrument delivered to the child.⁸ So voluntary subscriptions for charitable purposes have been enforced against the subscribers, on the theory, though, that the promise of each subscriber was a consideration for the other.⁹

ILLUSTRATIONS. — A father gave his son his promissory note for one thousand dollars, payable sixty days after date. *Held*, that this was a mere promise to make a gift, and could not be recovered by the son against the executor of the father: *Fink v. Cox*,

¹ *Peck v. Brummagin*, 31 Cal. 440; 7 J. J. Marsh. 448; 23 Am. Dec. 89 Am. Dec. 195; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609.

² *Vogel v. Gart*, 20 Mo. App. 104.

³ *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 148.

⁴ *Williams v. Forbes*, 114 Ill. 167.

⁵ *Cloyes v. Cloyes*, 36 Hun, 145.

⁶ *Picot v. Sanderson*, 1 Dev. 309.

⁷ *Caldwell v. Williams*, 1 Bail. Eq. 175; *McIntyre v. Hughes*, 4 Bibb, 186. See note to *Anderson v. Green*,

7 J. J. Marsh. 448; 23 Am. Dec. 417.

⁸ *Marling v. Marling*, 9 W. Va. 79; 27 Am. Rep. 535. Where a voluntary conveyance by a father to his son was destroyed by the father after it had been delivered, but before registration the court ordered a new conveyance to the son: *Tolar v. Tolar*, 1 Dev. Eq. 456; 18 Am. Dec. 598.

⁹ *Watkins v. Eames*, 9 Cush. 537; *Ives v. Sterling*, 6 Met. 310; *Mirick v. French*, 2 Gray, 420.

18 Johns. 145; 9 Am. Dec. 191.¹ An instrument read: "This will certify that I do give to J. one hundred dollars, the money to be paid as soon as my financial condition will allow, and if I do not live to pay it, I wish it paid out of my estate." *Held*, to be a promise to make a gift, and not the subject of an action: *Johnston v. Griest*, 85 Ind. 503. An engagement of marriage had existed between the plaintiff and A. The latter was subject to heart-disease, and when ill had frequently sent for the plaintiff to come and take care of him. On the night before the date of the note, A had an unusually severe attack, and said that if he got out of that he must have some writing done; the next day he made and signed the note, and handed it to the plaintiff in a sealed envelope, saying that there was something which would provide for her in case anything should happen to him; that if they were married, and he wanted it given up, he should expect her to give it up, to which she assented. The plaintiff had performed service for A. *Held*, that the note was intended by A as a provision for the plaintiff by way of gift out of his estate, and no action could be maintained on it: *Warren v. Durfee*, 126 Mass. 338. A bill was delivered by a father shortly before his death to his son, who afterwards took out letters of administration, at the same time telling him to collect it and take care of it. *Held*, not a gift, and the son was required to account for it: *Prickett v. Prickett*, 20 N. J. Eq. 478. S. indorsed on a bond which he held against Z., "I request my executors to give this bond to A.," granddaughter of the obligee and wife of the obligor, "for her great kindness she has shown to me and her grandmother." After A signing and sealing this, he added, "This is not to interfere with what I will to her; this she is to have beside that." The bond remained undelivered to A., and in S.'s possession until his death. *Held*, that a prospective gift was indicated, and the bond did not pass to A.: *Zimmerman v. Streeper*, 75 Pa. St. 147. S. on buying and paying for thirty shares of railway stock directed the treasurer to set it aside in Y.'s name, saying he, S., would at some future time let him know whether to deliver it to Y. The treasurer issued a receipt stating he had received the price from Y. At S.'s request Y. gave an order directing the company to transfer three shares as S. might direct. No certificate was ever issued. By direction of S. the dividends were paid to Y. In an action by Y.'s executor to compel the company to issue to him a

¹ The court saying: "The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus penitentiae*. It was an engagement to give, and not a gift": *Priester v.*

Priester, Rich. Eq. 26; 23 Am. Dec. 191; *Arnold v. Franklin*, 3 Brad. App. 141; *Hall v. Howard*, Rice, 310; 33 Am. Dec. 115; *Pearson v. Pearson*, 7 Johns. 26.

certificate of the stock, it did not appear how Y. came into possession of the receipt. *Held*, that there was no valid gift of the stock: *Jackson v. R. R. Co.*, 88 N. Y. 520. A owes B by account which B has directed A to pay to C. *Held*, that as a parol gift notice from B to A to pay it to no one but B is a revocation: *Chandler v. Chandler*, 62 Ga. 612. The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted the gift was incomplete; and that in the absence of such payment or acceptance the death of the drawer operated as against the payee as a revocation of the check: *Simmons v. Cincinnati Savings Society*, 31 Ohio St. 457; 27 Am. Rep. 521. A deposited in a savings bank money in the name of B, but without her knowledge, "sub. to A," on the books of the bank and on the bank pass-book, received the dividends and such portion of the principal as she required for her own use, and held the pass-book always in her possession until her death. *Held*, not a gift *inter vivos*; that there was no trust in favor of B, and that if there was, B was trustee for the depositor, and could not claim or hold the deposit in her own right: *Northrop v. Hale*, 73 Me. 66. A father made an assignment under seal to his daughter of shares of corporate stock. A gift was intended, although, on its face, the assignment appeared to be for value. *Held*, that equity would not, after the father's death, perfect the incomplete assignment by compelling a transfer of the stock on the corporate books: *Baltimore Retort and Fire Brick Co. v. Mali*, 65 Md. 93; 57 Am. Rep. 304. Plaintiff claimed title to a lot of coin, worth over seven thousand dollars, by gift. The evidence tended to show that on the day before the alleged donor died, he told the father to take possession of the coin, which was pointed out; that it was a gift to plaintiff; that the father took possession accordingly, but that before plaintiff had any further connection with the matter, the donor died. It did not appear that he made the gift because of a belief in impending death. *Held*, not sufficient to constitute a gift: *Dickeschied v. Exchange Bank*, 28 W. Va. 340.

§ 1328. **Gifts on Condition.**—If a condition be annexed to a gift, it must be performed according to its terms, or it will fail and revert to the donor.¹ A delivery of bonds, under a contract of redelivery "whenever called for," cannot be an absolute gift.² So property delivered,

¹ *Halbert v. Halbert*, 21 Mo. 277.

² *Selleck v. Selleck*, 107 Ill. 389.

subject to be reclaimed in case the donor should return from abroad, if not to belong to the person to whom it is delivered, is not a gift.¹ A promise, however, by the donee, not amounting to a condition, which he fails to carry out, does not affect the gift.²

ILLUSTRATIONS. — A gave goods to B on condition that certain of A's debts should be paid from their proceeds. Part of the goods were sold and the debts paid. *Held*, that other creditors of A had no claim upon the remainder, the gift having been originally valid as against creditors: *Riegel v. Wooley*, 81½ Pa. St. 227. A gave B a mare with foal, stipulating that if she should prove to be with foal, the colt should be A's. B sold the mare to C, not informing him of the reservation. *Held*, that this was a valid reservation, and that C had only the right which the vendee of the bailee of goods would have, and this, whether he was or was not informed of the reservation, and that A might recover the colt in an action against C: *Wolf v. Esteb*, 7 Ind. 448.

§ 1329. **Delivery Essential to Gift — What is and is not a Delivery.** — To make the gift perfect, it must be delivered to the donee, and until the delivery takes place the donor may revoke it.³ Delivery of possession is essential to validity of a gift of personal chattels, whether it is made by parol or by an instrument in writing; and if immediate delivery of possession does not take place, it is not a gift, but a contract.⁴ To constitute a delivery it is essential that the giver should part with his control over the chattel; and where his intention is to vest a future interest, though he may go through the form of delivering the chattel, yet inasmuch as he retains his control over it, there is no delivery.⁵ Whatever authorizes the

¹ *Walden v. Dixon*, 5 T. B. Mon. 170.

² *Doty v. Wilson*, 47 N. Y. 580.

³ 2 Schouler on Personal Property, sec. 167; 2 Kent's Com. 438; *Taylor v. Staples*, 8 R. I. 170; 5 Am. Rep. 556; *Cox v. Sprigg*, 6 Md. 274; *Noble v. Smith*, 2 Johns. 52; 3 Am. Dec. 399; *Bullock v. Tinnen*, 2 Car. Law Rep. 271; 6 Am. Dec. 562; *Collins v. Lofftus*, 10 Leigh, 5; 34 Am. Dec. 719;

Little v. Willetts, 55 Barb. 125; 37 How. Pr. 481; *Brantley v. Cameron*, 78 Ala. 72; *Roberts v. Draper*, 18 Ill. App. 167; *Marcy v. Amazeen*, 61 N. H. 131; 60 Am. Rep. 320; *Nutt v. Morse*, 142 Mass. 1; *Orr v. McGregor*, 43 Hun, 528. See *Reid v. Colcock*, 3 Nott & McC. 592; 9 Am. Dec. 729.

⁴ *McWillie v. Van Vachter*, 35 Miss. 428; 72 Am. Dec. 127.

⁵ *Busby v. Byrd*, 4 Rich. Eq. 9.

taking possession of the gift will be regarded as a good delivery.¹ So a gift of personalty may be made by a deed, without actual delivery of the articles.² A valid gift of a debt due the donor from the donee may be made by the donor by balancing the books of account and delivering a receipt in full to the donee.³ A valid gift may be made of a debt by delivery to the donee of any evidence of the debt existing; if none, then by a delivery of a receipt in full thereof.⁴ Indorsements of part payments on a mortgage with the intention of making the amounts expressed a gift to the mortgagor are an extinguishment or forgiving of the mortgage debt to that extent. Where the gift is made to the debtor himself, and does not admit of a technical delivery, the intention of the donor will not be defeated on that ground.⁵ Pointing out the articles and saying "I give you these," is a good delivery.⁶ In the case of bulky goods, giving the key or other means of taking possession;⁷ in the case of a savings bank deposit delivering the bank-book.⁸

A note or mortgage may pass as a gift by delivery without being indorsed or assigned.⁹ The death of the donor before delivery revokes the gift.¹⁰ Ownership of personal property is presumed from possession of it.¹¹ Possession of personal property is not title. It is *prima facie* evidence of title, but nothing more, and will not protect one

¹ Blake v. Jones, 1 Bail. Eq. 141; 21 Am. Dec. 530; Sanborn v. Goodhue, 28 N. H. 48; 59 Am. Dec. 398.

² Connor v. Trawick, 37 Ala. 289; 79 Am. Dec. 58.

³ Gray v. Barton, 55 N. Y. 68; 14 Am. Rep. 181.

⁴ Gray v. Barton, 55 N. Y. 68; 14 Am. Rep. 181.

⁵ Green v. Langdon, 28 Mich. 221.

⁶ Allen v. Cowan, 23 N. Y. 502; 80 Am. Dec. 316; Penfield v. Public Adm'r, 2 E. D. Smith, 305.

⁷ 2 Schouler on Personal Property, sec. 67; Marsh v. Fuller, 18 N. H. 360.

⁸ Prov. Sav. Inst. v. Taft, 14 R. I. 502.

⁹ Hale v. Rice, 124 Mass. 292; Montgomery v. Miller, 3 Redf. 154.

¹⁰ Sessions v. Moseley, 4 Cush. 87; Grover v. Grover, 24 Pick. 261; 35 Am. Dec. 319.

¹¹ Fitzhugh v. Anderson, 2 Hen. & M. 289; 3 Am. Dec. 625; Avey v. Clemons, 18 Conn. 306; 46 Am. Dec. 323; Magee v. Scott, 9 Cush. 148; 55 Am. Dec. 49; Burke v. Savage, 13 Allen, 409; Dick v. Cooper, 24 Pa. St. 217; 64 Am. Dec. 652; Orr v. New York, 64 Barb. 106; Wiseman v. Lynn, 39 Ind. 259; see note to Plume v. Seward, 4 Cal. 94, in 60 Am. Dec. 601-604.

who buys on the faith of it against the holder of the title.¹ Possession of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. With this exception the effect of possession as evidence of ownership is subordinate to the principles that no one can be divested of his property without his consent, and that no one can transfer a better title than he has himself.² The fact that a party was in the actual possession of a building which was personal property, making and paying for repairs upon it, and offering to sell it, and exercising other acts of ownership, furnishes presumptive evidence of ownership in him subject to be rebutted by the adverse claimant. If it is shown that such person was an agent employed to superintend the making of such repairs, then no title could be based upon such acts of ownership.³ Where the subject of a gift remains with the donor, the jury should be allowed to determine whether any argument against the fact of delivery that might be adduced from that circumstance is not explained by the further fact that the home of the donor and donee is the same.⁴

A gift may be presumed from delivery; as where a father furnishes household goods to his newly married son or daughter,⁵ or suffers his property, on his marriage, to go into the possession of his child.⁶ An executed gift of furniture from a mother to her son may be inferred from evidence of her declarations of such intent and the remaining of the son in her house where the furniture

¹ Ketchum v. Brennan, 53 Miss. 596.

² Wright v. Solomon, 19 Cal. 64; 79 Am. Dec. 197.

³ Amick v. Young, 69 Ill. 542.

⁴ Sims v. Sims, 8 Port. 449; 33 Am. Dec. 293.

⁵ Betts v. Francis, 30 N. J. L. 152.

⁶ De Graffenried v. Mitchell, 3 Mc-

Cord, 506; 15 Am. Dec. 648; Martrick v. Linfield, 21 Pick. 325; 32 Am. Dec. 265; Olds v. Powell, 7 Ala. 652; 42 Am. Dec. 605; Dugan v. Gittings, 3 Gill, 138; 43 Am. Dec. 306; Danley v. Rector, 10 Ark. 211; 50 Am. Dec. 242; Hillebrant v. Brewer, 6 Tex. 45; 55 Am. Dec. 757.

was, until her death.¹ Upon the question of whether a father agreed to give a house to a child, the fact that the taxes were assessed against the father is not conclusive evidence, while the fact that the child paid them is a significant circumstance in his favor.²

ILLUSTRATIONS.—A father, holding a mortgage against his son, and intending to make him a gift, executed and delivered to him a receipt for a portion of the debt, providing that the amount should be indorsed on the mortgage. *Held*, a valid gift of so much, although the indorsement was never made: *Carpenter v. Soule*, 88 N. Y. 251; 42 Am. Rep. 248. A father procured a brand to be recorded in the name of his child, and with it branded certain cattle, under circumstances that showed he intended to give them to the child. *Held*, that there was a sufficient delivery to consummate the gift: *Hillebrant v. Brewer*, 6 Tex. 45. The intestate, on the eve of his departure, told the plaintiff that he gave his trunk and all in it to her, and left town, but returned again, and soon died, and it in no way appeared that he interfered with the property afterward. *Held*, that this abandonment of the subject of the gift to the plaintiff's control and dominion indicated that the gift was absolute: *Penfield v. Thayer*, 2 E. D. Smith, 305. A father delivered to the husband of his daughter upon the marriage, without expressing any qualification, certain chattels. *Held*, that the property vested in the husband, and that the father could not treat it as a loan of the property: *White v. Palmer*, 1 McMull. Ch. 115. A deposited a sum of money belonging to himself in a savings bank, in the name of B, taking a deposit-book in which was an entry that B had deposited so much money. The treasurer made a similar entry in the bank-book. *Held*, that the transaction amounted to a complete gift, although the book remained in the possession of A until the decease of B: *Howard v. Windham County etc. Bank*, 40 Vt. 597. A gift of an insurance policy, to be exchanged by the donor's assent for one drawn according to the donee's wishes, *held*, to be sufficiently consummated by delivery when the policy was handed to the donee and returned to be forwarded to the insurance company by the donor's order and exchanged, without objection on the part of the donor: *Crittenden v. Phoenix Mutual Ins. Co.*, 41 Mich. 442. A's indorsing on a note, "I transfer the within note as a gift to B," handing it to C, directing C to give it to B after A's death, and also informing B that he, A, had given B the

¹ *Harris v. Hopkins*, 43 Mich. 272; ² *Fairfield v. Barbour*, 51 Mich. 57.
38 Am. Rep. 180.

note, *held*, to constitute a valid gift *inter vivos*: *Meriwether v. Morrison*, 78 Ky. 572. S. deposited in a savings bank five hundred dollars belonging to herself, declaring at the time that she wanted the account to be in trust for L., the pass-book entry being as "in account with S., as in trust for L." S. also made a like deposit, similarly in trust, for K., who was a sister of L. Both L. and K. remained ignorant of the deposit until S.'s death, nine years afterwards, S. meanwhile retaining the pass-books and drawing one year's interest. *Held*, that S. constituted herself a valid trustee, and that the gift was complete without notice to the *cestuis*: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. D. deposited in a savings bank, in his own name, all he was permitted under the rules, and then made three other deposits as trustee, one for his only son, the others for his grandchildren, taking separate bank-books, which he never delivered, but which were found among his effects on his death. He received the dividends during his life. The rules provided that he must produce the books to receive dividends, in order that they might be entered, and that any depositor might designate the person for whose benefit he made the deposit which should bind his legal representatives. The son and grandchildren offered to prove that he had told each of them that he had made and intended the deposits for them after his death, but he wanted to draw the interest during his life. *Held*, competent and to justify a finding of a complete and effectual trust: *Gerrish v. New Bedford Inst. for Sav.*, 128 Mass. 159; 35 Am. Rep. 365. H., an invalid, had collected and kept apart in a sack some two thousand dollars in gold coin. He gave it into the hands of a friend and neighbor to keep and use it for H.'s daughter, some seven or eight years old. The receiver asked Mrs. H. to keep it for him till he should call or send for it, and she kept it accordingly. This was with H.'s knowledge and approval. H. died away from home, and thereafter Mrs. H. sent the sack and money to the bailee. *Held*, a valid gift: *Nolen v. Harden*, 43 Ark. 307; 51 Am. Rep. 563. A father, in his dwelling-house, in the presence of witnesses, gave to a son a carriage, which was locked up in a carriage-house on the premises. *Held*, a sufficient delivery to constitute a completed gift: *Fletcher v. Fletcher*, 55 Vt. 325; 45 Am. Rep. 627. The testator, before his death, placed certain notes in the possession of his married daughter for safe-keeping. Subsequently he told her that she might have the notes, but there was no formal delivery. He did not call upon her afterwards for small sums on account of the notes, as he had previously been accustomed to do. *Held*, that the gift of the notes to the daughter was perfect and irrevocable: *Wing v. Merchant*, 57 Me. 383. A purchased bonds, which he caused to be

registered in B's name, and the income from which, as it accrued, he deposited in B's name. A declared at various times that he wanted to create a fund for B's benefit. A retained possession of the bonds, and they were found among his papers after his death. *Held*, that B took title thereto by gift: *In re Townsend*, 5 Demarest, 147. A deposited money in a savings bank in the name of B, "subject to the order of A," and afterwards temporarily gave the deposit-book to B, but immediately took it back again to place for safe-keeping in his safe. He afterwards gave B a certificate that the money was his, and himself asserted no ownership over it during his life. *Held*, that there was a completed gift to B: *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208. On the day before he died, the plaintiff's testator delivered to defendant, with the intention of giving it to her, a bank check drawn by another to testator's order and indorsed in blank by him. The check was not presented for payment until after testator's death. *Held*, a valid gift: *Burke v. Bishop*, 27 La. Ann. 465; 21 Am. Rep. 567. M., who had money on deposit in a savings bank, handed her bank-book to C., at the same time saying to him that she gave the money in that book to H. and I., and requested him to keep the book, and after her decease divide the money between H. and I. *Held*, a valid gift to H. and I. of the money on deposit: *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231. One who has just purchased under a chattel mortgage made by her husband, pointing out certain of the articles to the wife, says to her, "I give you these and all the property I have purchased this day"; and such property remains after the gift in the house occupied by the husband and wife together. *Held*, to be in the possession of the wife, and not liable to execution against the husband: *Allen v. Cowan*, 23 N. Y. 502; 80 Am. Dec. 316. The plaintiff, niece of an aged, childless, and rich widower, lived with him and took care of him for eleven years, at his request, and on his promise to compensate her. After five years he made his will giving her ten shares of a certain stock, and informed her of it, and obtained her assent that it was a satisfactory provision, and at the same time said he should do more for her from time to time. A year later he handed her the certificate, saying, "I give this to you," and she put and kept it among her papers. A few months later, the company having issued to him forty shares of new stock as his share of surplus earnings, he gave her the certificate, saying, "This insurance stock of yours is good stock; they give forty shares for ten; it is only a change of form, that is all; I paid nothing for it." She placed the certificate with the other. *Held*, that the title to both vested in her: *Reed v. Copeland*, 50 Conn. 472; 47 Am. Rep. 663. A and B,

brothers, buried two boxes of silver dollars, belonging to them equally. A died, and C was appointed his executor. Subsequently B told C and others that he wanted a third brother, D, to have his share of the treasure after B's death. Subsequently C and D, with the consent and assistance of B, disinterred the money during B's life, and deposited it in a house occupied by B and C. Six days later B died, and after his burial, the money was equally divided between C and D. *Held*, a valid delivery: *Carradine v. Carradine*, 58 Miss. 286; 38 Am. Rep. 324. B. deposited in a savings bank certain moneys in his own name as trustee for R. B. gave the bank-book to R., who returned it to B., in whose control it remained. B. was childless. R. was his step-daughter. It was in evidence that B. was a man of few words, and that he treated R. as his daughter. In an equity suit by R. against the administrator of B., claiming the deposit as trust funds held by B. for R., *held*, that the trust was completely constituted. *Held*, further, that the trust being constituted, the fact that it was voluntary was no reason for refusing relief: *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447. A told B that he gave him the corn growing in a certain field, but there was no further delivery. B afterwards cut and carried away the corn. *Held*, that B was a trespasser: *Noble v. Smith*, 2 Johns. 52; 3 Am. Dec. 399. A piano remained in the house of the donor and was used by the donee, who was not a resident of said house. *Held*, that there was no such delivery as to enable the donee to maintain an action to recover possession of a third party: *Willey v. Backus*, 52 Iowa, 401. A promised to give a bank certificate to B. Afterwards B found the certificate in a room usually occupied by him and A. *Held*, that this was not sufficient to show a delivery of the certificate: *Buschian v. Hughart*, 28 Ind. 449. Stock stood in a testator's name on the books of the corporation. The certificate is found in the executor's possession, and the testator gave him the power of attorney to receive and assign any scrip or dividend due him from the company. *Held*, not conclusive evidence of a gift of the stock to the executor: *Smith v. Burnet*, 34 N. J. Eq. 219; 35 N. J. Eq. 314. A father said to his son that he might have a certain colt, if he would raise it; there was other evidence tending to show that the father intended that the son should have the colt, but there was no evidence of delivery. *Held*, that the title to the colt did not pass: *Medlock v. Powell*, 96 N. C. 499. A, having indorsed a certificate of deposit to B, gave it to his own attorney to keep in his safe, stating that "it was for B." After A's death the attorney delivered the certificate to B. *Held*, that there was no delivery constituting a valid gift to B: *Scott v. Lauman*, 104 Pa. St. 593. A father pointed out to his daughter a colt, saying, "That is

your property; I give it to you," but retained the possession. *Held*, that no title passed to her: *Brewer v. Harvy*, 72 N. C. 176. A father signed a release of a note and mortgage executed by his daughter, put it with them in his safe, and it remained there until his death. Shortly after signing the release, he made his will giving the daughter a much larger amount. *Held*, that the release did not take effect for want of delivery: *Brunn v. Schuett*, 59 Wis. 261; 48 Am. Rep. 499. A deposited money in a savings bank in the name of B without any declaration of trust contemporaneously or subsequently, and not in view of death, and retained the deposit-book until his death. *Held*, not a gift or trust: *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308. A deposited money in a savings bank in B's name, but kept the pass-book, in which a condition that the money should be paid to B after A's death was written. A drew the interest, and B had no knowledge of the deposit until after A's death. *Held*, that A's executor, and not B, was entitled to the deposit: *Sherman v. New Bedford Savings Bank*, 138 Mass. 581. Alden Burton, at his death, left two savings-bank deposit-books, one in his own name, the other in that of "James Burton [his son], order of Alden Burton." On the last page of each was an order signed by him to pay the deposit to James, that in the former book being absolute, that in the other book directing the payment to be made at his death. Deposits and drafts were made after the dates of the orders. Neither of the books was delivered to James, and he had no knowledge of them. *Held*, not a valid gift: *Burton v. Bridgeport Savings Bank*, 52 Conn. 398; 52 Am. Rep. 602. The plaintiff's father, with the intention of making a gift, delivered to each of his sons a check on a savings bank, payable four days after his death, and also to one of them the bank pass-book; he stated at the same time that he should want the control and interest of the money during his life, and that they would need the books to get the money, and that he delivered them for safe-keeping; the checks did not equal the fund on deposit; the books were immediately deposited in the bank, and remained there until the father's death. In an action against the executor, *held*, that the transaction was not a gift, because there was no transfer or relinquishment of control over the fund; and also *held*, that the transaction was not a declaration of trust or gift by appropriation or appointment: *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577. The intestate placed bonds in two envelopes, indorsing and signing a memorandum that they belonged to his sons, W. and J., in specified proportions, on his death, but that the interest was owned and reserved by him during his life. He showed the indorsed packages to their wives, stating that he believed he had made a valid disposition of the

bonds. He then put and kept them in a safe in the house of his son W. where he himself lived, and in which safe W. also kept some papers, but of which safe the intestate had practical control, and they were found there on his death. He cut off and used the coupons during his lifetime, and once gave a bond from one of the packages to a third person. He spoke of them as the bonds of the sons. The son J. had no access to the safe, and neither son exercised any control over the bonds, as against the father. *Held*, neither a gift nor a declaration of a trust: *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634. Prior to A's marriage with B, and while she was engaged to him, he was very sick, and sent to the bank for certain bonds there deposited in his name, which he examined while lying in bed, and handed to A, telling her to put them in a certain drawer, and subsequently told her to take home with her a similar looking package, which she did. Subsequently the bonds were returned to the bank, and deposited in the name of B, who afterwards sold one, and told C that he could realize on the other bonds, but did not want to, as he had given them to A. *Held*, that there was not sufficient evidence to establish a gift of the bonds to A: *Martin v. Smith*, 25 W. Va. 579.

§ 1330. **Acceptance, how Far Essential.** — Acceptance is essential to the validity of a gift, but will usually be presumed if the donee is *sui juris*. If he is an infant, or otherwise under disability, the law accepts it for him, if it is to his advantage.¹ The assent of both parties is as necessary to a gift as to a contract.²

ILLUSTRATIONS. — H. made his promissory note, whereby one year after date he promised to pay to the order of the treasurer of a theological seminary four thousand dollars, with annual interest. Subjoined to the note was a statement that it was a donation, the interest of which was to be applied to the purchase of books for the library of the seminary. This note was delivered by the maker to the chairman of the seminary library committee. Shortly thereafter the maker died. Subsequent to his death, and before the maturity of the note, the trustees of the seminary at a meeting accepted the note as a donation for the purpose therein named. *Held*, that the note being without consideration, and not having been accepted by the trustees before the maker's death, that event operated as a revocation,

¹ De Levillain v. Evans, 39 Cal. 120; ² Peirce v. Burroughs, 58 N. H.
Howard v. Savings Banks, 40 Vt. 597; 302.
Goss v. Singleton, 2 Head, 67.

and the estate of the maker was not liable therefor: *In re Helfenstein*, 77 Pa. St. 328; 18 Am. Rep. 449.

§ 1331. **Executed Gift is Irrevocable — Extent and Effect of.** — A gift once perfected by delivery or otherwise is irrevocable,¹ and divests the title of the donor, his administrator, and his creditors.² A gift to a creditor by his debtor of the equity of redemption in the land mortgaged to secure the debts will be sustained, if it appears that by relationship or otherwise the donee was a proper object of the donor's bounty.³ An executed gift of personal property from a father to his minor child residing in his family is valid and irrevocable, although the property continues in the house occupied by the family.⁴ A gift of the produce or interest of a fund without limitation is a gift of that produce or interest forever, and consequently is a gift of the fund itself.⁵ So a gift of personal property for life with an absolute power of disposing amounts to an absolute gift of it,⁶ and a remainder over to another of what is left, is void.⁷ But a remainder over after an estate for life, with only the use of the property during that time, is good.⁸

¹ *Parker v. Ricks*, 8 Jones, 447. No consideration is necessary to support gifts, and if made *bona fide*, and there is immediate delivery of possession, they are good against the world: *McWillie v. Van Vacter*, 35 Miss. 428; 72 Am. Dec. 127. One who has made a donation *inter vivos* of property to his concubine cannot on the latter's death recover the property on the ground that the donation violated a prohibitory law, and was opposed to good morals: *Monatt v. Parker*, 30 La. Ann. 585; 31 Am. Rep. 229.

² *Anderson v. Belcher*, 1 Hill, 246; 26 Am. Dec. 174; *Sanborn v. Goodhue*, 28 N. H. 48; 59 Am. Dec. 398; *Faxon v. Durant*, 9 Met. 339.

³ *Hester v. Hester*, 13 Lea, 189.

⁴ *Kellogg v. Adams*, 51 Wis. 138; 37 Am. Rep. 815.

⁵ *Garret v. Rex*, 6 Watts, 14; 31 Am. Dec. 447; *Campbell v. Gilbert*, 6 Whart. 77; *Myers v. Byerly*, 45 Pa. St. 368; 84 Am. Dec. 497; *Robert's Appeal*, 59 Pa. St. 73; 98 Am. Dec. 312; *Manning v. Craig*, 4 N. J. Eq. 436; 41 Am. Dec. 739; *Maulding v. Scott*, 13 Ark. 18; 56 Am. Dec. 298.

⁶ *Thompson v. McKisick*, 3 Humph. 635; *Booker v. Booker*, 5 Humph. 513; *Deadrick v. Armour*, 10 Humph. 593; *Bean v. Myers*, 1 Cold. 228; *Williams v. Jones*, 2 Swan, 624; *Davis v. Richardson*, 10 Yerg. 290; 31 Am. Dec. 581.

⁷ *Davis v. Richardson*, 10 Yerg. 290; 31 Am. Dec. 581.

⁸ *Smith v. Bell*, 1 Mart. & Y. 302; 17 Am. Dec. 798.

ILLUSTRATIONS. — A wealthy and childless widow deposited in a savings bank two hundred and fifty dollars in her own name, as trustee for W., the child of a neighbor and friend. Soon after she told his parents that she had deposited such sum for their son, and afterwards spoke of it as belonging to him. She afterward drew out the money at different times, and applied it to her own use, and died leaving a will, in which no mention was made of the deposit or of W. *Held*, that the deposit was a complete gift, that the depositor could not revoke it, and that her executor was liable to W. for the amount: *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69. A father bought a piano for his minor daughter, and two months afterward, on her attaining majority, presented it to her formally and publicly at a birthday party that he made for her. The daughter used it as her own, and the family treated it as hers at home for several years, and until her marriage. After that she lived sometimes at her father's house, and sometimes away, but allowed the piano to remain in his house, as she had no place to keep it. *Held*, a valid gift, as against her father's creditors attaching it by his consent but without her knowledge: *Ross v. Draper*, 55 Vt. 404; 45 Am. Rep. 624. A executed an instrument transferring stock to his wife and children, and delivered the instrument to one of them, with directions to see that the business was perfected. *Held*, a gift of the stock, which therefore did not pass by a subsequent will: *De Caumont v. Bogert*, 36 Hun, 382. A father made a parol gift of land to his son, and the latter entered into possession and made valuable improvements in reliance upon such gifts. *Held*, that the gift was irrevocable in equity, and a conveyance of the land to the son would be decreed: *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665.

1332. Gifts Causa Mortis—Must be Made in Expectation of Death. — A gift or *donatio causa mortis*, unlike a gift *inter vivos*, as we have seen, must be made “in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event.”¹ The donor must have good cause to believe that his decease is near;² though this need not arise

¹ *Edwards v. Jones*, 1 Mylne & C. v. Saco. etc. Savings Inst., 78 Me. 233; *Duffield v. Elwes*, 1 Bligh, N. R., 470.

² 2 Schouler on Personal Property, St. 345; *Linsinbigler v. Gourley*, 56 Pa. St. 166; 94 Am. Dec. 51; *Parcher v. Kirby*, 18 Pa. St. 326; *Grattan v.*

from sickness or disease alone; it may arise from infirmity or old age, or it may be in apprehension of any other extreme danger or peril.³ An invalid testamentary disposition will not be supported as a valid gift *causa mortis*;⁴ nor will an ineffectual gift *inter vivos* be supported as a gift *causa mortis*.⁵ Gifts *causa mortis* are said to be against the policy of the law; they are not favored by the courts, and they are required to be strictly proved.⁶

ILLUSTRATIONS. — The deceased was in his last illness suffering from an incurable disease. He had just made his will, and everything tended to show that he was in present apprehension of death. *Held*, that under such circumstances a gift of his horses, furniture, wearing apparel, and watch was a gift *mortis causa*, and not *inter vivos*: *Delmotte v. Taylor*, 1 Redf. 417. One, about to flee from home to escape the rebel conscription, delivered certain moneys and notes to the donee's mother, to go to him as a gift in case the donor should never return, and, enlisting in the Union army, died without returning. *Held*, to be a valid gift *causa mortis*: *Gass v. Simpson*, 4 Cold. 288; *contra*, *Dexheimer v. Gautier*, 5 Robt. 216. P., when in feeble health, deposited a box of gold in a bank, instructing the cashier to deliver it to no one except himself, or his (P.'s) wife, and P. delivered the key to his wife, informing her of the deposit as being made for her, and that she could only get it by applying at the bank personally. *Held*, not to establish a gift either *causa mortis* or *inter vivos*: *Sheegog v. Perkins*, 4 Baxt. 273. A wife, a few days before her death, signed a letter drawn up by her husband addressed to a bank in which she had funds, stating that her health was so much worse that she feared she might not be able to draw for money when needed, and requesting that the funds standing in her name might be transferred to that of her husband. *Held*, that the funds did not become the property of the husband by *donatio causa mortis*: *First*

Appleton, 3 Story, 755; *Thompson v. Thompson*, 12 Tex. 327; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *Irish v. Nutting*, 47 Barb. 370; *Smith v. Dorsey*, 38 Ind. 451; 10 Am. Rep. 118; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486.

³ 2 Kent's Com. 544; *Parish v. Stone*, 14 Pick. 198; 25 Am. Dec. 378; *Craig v. Kittredge*, 46 N. H. 57; *French v. Raymond*, 39 Vt. 623; *Irish v. Nutting*, 47 Barb. 370; *Dexheimer v. Gautier*, 34 How. Pr. 472; *Grymes v.*

Hone, 49 N. Y. 17; 10 Am. Rep. 313; *Michener v. Dale*, 23 Pa. St. 59; *Baker v. Williams*, 34 Ind. 547; *Virgin v. Gaither*, 42 Ill. 39; *Thompson v. Thompson*, 12 Tex. 327.

⁴ *Mitchel v. Smith*, 12 Week. Rep. 941.

⁵ *Edwards v. Jones*, 1 Mylne & C. 226.

⁶ *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352; *Delmotte v. Taylor*, 1 Redf. 423; *Kenney v. Public Adm'r*, 2 Bradf. 321.

Nat. Bank v. Balcom, 35 Conn. 351. A soldier, while at home on furlough, deposited a certain sum with a friend, who gave him a written agreement to return the money if the soldier should return alive; but if he should die, then the money was to be paid to the soldier's infant sister. The soldier died, leaving the sister and a brother the only heirs. *Held*, that the brother could not maintain a suit against his sister for one half the money received by her: *Baker v. Williams*, 34 Ind. 547. A soldier, about to start for the army, handed to a friend two promissory notes inclosed in an envelope addressed to plaintiff, and told him to deliver it to her, and if he never came back he wanted her to get the notes; that he would rather she would have them than any other person. They were delivered to her two days afterwards. The donor was in good health at the time, but died of disease in the army, about four months after: *Held*, not a good *donatio mortis causa*: *Gourley v. Linsenbigler*, 51 Pa. St. 345. Plaintiff's intestate entered the military service during the late war, and just before starting for the army said to defendant, to whom he had loaned a gun: "If I never return you may keep the gun as a present from me." He never returned, but died in the service. In an action by his administrator to recover the gun, *held*, that the facts did not constitute a gift either *inter vivos* or *causa mortis*: *Smith v. Dorsey*, 38 Ind. 451; 10 Am. Rep. 118. The defendant's testator, being about eighty years of age and in failing health, made an absolute assignment of twenty shares of bank stock to his granddaughter, and handed the assignment to his wife, with instructions to give it to her granddaughter in case of his death. Five months after, he died. *Held*, 1. That it was a valid gift *causa mortis*; and 2. That the court could enforce it, notwithstanding the fact that the stock had not been transferred upon the books of the bank: *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313.

§ 1333. **Absolute only on Donor's Death.**—A *donatio mortis causa* is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life.¹ And if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated.²

¹ *Basket v. Hassell*, 107 U. S. 602.

² *Ward v. Turner*, 1 Smith's Lead. Cas. 983; *Stamland v. Willett*, 3 Macn. & G. 664; *Grattan v. Appleton*, 3 Story, 755; *Smith v. Downey*, 3 Ired. Eq. 268; *Shirley v. Whitehead*, 1 Ired.

Eq. 130; *Parish v. Stone*, 14 Pick. 198; 25 Am. Dec. 378; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *McCarty v. Kearnan*, 86 Ill. 291; *Holley v. Adams*, 16 Vt. 206; *Priester v. Priester*, Rich. Eq. 26; 23 Am.

Until death the title to the subject of the gift remains in the donor, and vests in the donee only at the time of the donor's death, having relation back to the time of delivery.¹ If one deposit money to be given to a certain charity, if the depositor never returns from an intended journey, there is not a *donatio causa mortis* if the depositor does return.²

§ 1334. **What Property may be Subject of.** — All personal chattels (but only personal property) may be the subject of such a gift;³ also, choses in action; as, a promissory note made by a third person payable to the order of the donor, or a bill of exchange,⁴ or a bond,⁵ or a deposit in a bank,⁶ a certificate of deposit,⁷ a coupon government bond, or a certificate of stock,⁸ or a life insurance policy.⁹ There cannot, it has been held, be a good *donatio mortis*

Dec. 191; *Weston v. Hight*, 17 Me. 287; 35 Am. Dec. 250. But a gift *inter vivos* of an estate and chattels on it, made by the donor to his wife when he expected to die soon, is not for that reason revocable on his recovery: *Gilligan v. Lord*, 51 Conn. 562.

¹ *Gass v. Simpson*, 4 Cold. 480.

² *Roberts v. Draper*, 18 Ill. App. 167.

³ *Michener v. Dale*, 23 Pa. St. 60; *Raymond v. Sellick*, 10 Conn. 480; *Welch v. Tucker*, 3 Binn. 366; *Meach v. Meach*, 24 Vt. 591.

⁴ *Austin v. Mead*, 15 L. R. Ch. Div. 651; *Veal v. Veal*, 27 Beav. 303; *Ran-kin v. Weguelin*, 27 Beav. 309; *Caldwell v. Renfrew*, 33 Vt. 213; *McConnell v. McConnell*, 11 Vt. 290; *Turpin v. Thompson*, 2 Met. (Ky.) 421; *Brown v. Brown*, 18 Conn. 414, 417; 46 Am. Dec. 328; *Borneman v. Sidlinger*, 15 Me. 429; 33 Am. Dec. 626; *Wing v. Merchant*, 57 Me. 383; *Grover v. Grover*, 24 Pick. 261; 35 Am. Dec. 319; *Bates v. Kempton*, 7 Gray, 382; *Parker v. Marston*, 27 Me. 196; *Coutant v. Schuyler*, 1 Paige, 316; *Harris v. Clark*, 2 Barb. 94; 3 N. Y. 93; *Champney v. Blanchard*, 39 N. Y. 111; *Jones v. Deyer*, 16 Ala. 221; *Blanchard v. Williamson*, 70 Ill. 647; *Ashbrook v. Ryon*, 2 Bush, 228; 92 Am. Dec. 481; *Southerland v. Southerland*, 5 Bush, 591; *Randell v. Lunt*, 51 Me.

253; *Sessions v. Moseley*, 4 Cush. 87; *Chase v. Redding*, 13 Gray, 418; *Westerloo v. DeWitt*, 36 N. Y. 340; 93 Am. Dec. 517; *House v. Grant*, 4 Lans. 296; *Stevens v. Stevens*, 2 Hun, 470; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 317; *Druke v. Heiken*, 61 Cal. 346; 44 Am. Rep. 553. A promissory note of a third person, secured by mortgage not payable to bearer, and not indorsed so as to transfer the legal title, may be the subject of a *donatio causa mortis*, without formal transfer of the mortgage: *Brown v. Brown*, 18 Conn. 410; 46 Am. Dec. 328.

⁵ *Waring v. Edmonds*, 11 Md. 424; *Walsh v. Sexton*, 55 Barb. 251; *Hackney v. Vrooman*, 62 Barb. 650; *Lee v. Boak*, 11 Gratt. 182. *Quere*, in *Bradley v. Hunt*, 5 Gill & J. 54; 23 Am. Dec. 597; *Brown v. Brown*, 18 Conn. 415; 46 Am. Dec. 328.

⁶ *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Bank*, 111 Mass. 285; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Pierce v. Bank*, 129 Mass. 425; 37 Am. Rep. 371.

⁷ *Westerlo v. De Witt*, 36 N. Y. 341; 93 Am. Dec. 517; *Chaney v. Basket*, 6 Rep., N. S., 769; *Brooks v. Brooks*, 12 S. C. 422.

⁸ *Walsh v. Sexton*, 55 Barb. 251.

⁹ *Witt v. Amis*, 1 Best & S. 109.

causa of railroad stock,¹ nor of the donor's own check upon a banker,² unless cashed in his lifetime or otherwise negotiated;³ nor of the donor's own promissory note.⁴ There cannot be a gift *causa mortis* of real estate.⁵

§ 1335. **Delivery of the Property Essential — What is and What not a Valid Delivery.** — Delivery of the thing is essential to validity of a gift *causa mortis*.⁶ If the gift

¹ Moore v. Moore, L. R. 18 Eq. 474.

² Tate v. Hilbert, 4 Brown Ch. 286; Boutts v. Ellis, 4 DeG. M. & G. 249; Hewitt v. Kaye, L. R. 6 Eq. 198.

³ Boutts v. Ellis, 4 DeG. M. & G. 249. But see Rolls v. Pearce, L. R. 5 Ch. Div. 730.

⁴ Blanchard v. Williams, 70 Ill. 647, 652; Parish v. Stone, 14 Pick. 198; 25 Am. Dec. 378; Priester v. Priester, Rich. Eq. 26; 23 Am. Dec. 191; Brown v. Moore, 3 Head, 671; Raymond v. Sellick, 10 Conn. 484; Smith v. Kittbridge, 21 Vt. 238; Voorhees v. Woodhull, 33 N. J. L. 494, 498; Hamor v. Moore, 8 Ohio St. 239; Starr v. Starr, 9 Ohio St. 74; Craig v. Craig, 3 Barb. Ch. 76; Dodge v. Pond, 23 N. Y. 69; Harris v. Clark, 3 N. Y. 93; 51 Am. Dec. 352; Copp v. Sawyer, 6 N. H. 386; Flint v. Pattee, 33 N. H. 520; 66 Am. Dec. 742; Holley v. Adams, 16 Vt. 206; 42 Am. Dec. 508; Wilbar v. Smith, 5 Allen, 197; Carr v. Silloway, 111 Mass. 26; Hall v. Howard, Rice, 310; 33 Am. Dec. 115. *Aliter* as to a sealed note; Mack's Appeal, 68 Pa. St. 231.

⁵ Meach v. Meach, 24 Vt. 591; Gilmore v. Whitesides, Dud. (S. C.) 13; 31 Am. Rep. 563.

⁶ Hanson v. Millett, 55 Me. 184; Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39; Darand v. Taylor, 52 Iowa, 503; Wing v. Merchant, 57 Me. 383; Taylor v. Henry, 48 Md. 550; 30 Am. Rep. 486; Pierce v. Bank, 129 Mass. 425; 37 Am. Rep. 371; Trorlicht v. Weizenecker, 1 Mo. App. 482; Curry v. Powers, 70 N. Y. 212; 26 Am. Rep. 577; Dean v. Dean, 43 Vt. 337; Wilcox v. Matteson, 53 Wis. 23; 40 Am. Rep. 754; Basket v. Hassell, 107 U. S. 602; Moore v. Moore, L. R. 18 Eq. 474; Resch v. Senn, 28 Wis. 286; Carpenter v. Dodge, 20 Vt. 595; Frost

v. Frost, 33 Vt. 639; Turner v. Brown, 6 Hun, 333; Cox v. Sprigg, 6 Md. 274; Powell v. Leonhard, 9 Fla. 359; Case v. Dennison, 9 R. I. 88; 11 Am. Rep. 222; Egerton v. Egerton, 17 N. J. Eq. 419; Dow v. Gould etc. Man. Co., 31 Cal. 629; Smith v. Wiggins, 3 Stew. 221; Singleton v. Cotton, 23 Ga. 261; McKenzie v. Downing, 25 Ga. 669; Hatch v. Atkinson, 56 Me. 324; 96 Am. Dec. 464; Young v. Young, 80 N. Y. 422; 36 Am. Rep. 634; Brown v. Brown, 18 Conn. 414, 417; 46 Am. Dec. 328; Phipps v. Hope, 16 Ohio St. 586; Craig v. Craig, 3 Barb. Ch. 76; Champlin v. Seeber, 56 How. Pr. 46; Waring v. Edmonds, 11 Md. 424; Bradley v. Hunt, 5 Gill & J. 54; 23 Am. Dec. 597; Harris v. Clark, 3 N. Y. 93; 51 Am. Dec. 352. In Miller v. Jeffress, 4 Gratt. 480, the court say: "It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing, and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor or bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person. A debt or duty cannot be released by mere parol, without consideration; and where there is nothing to surrender by delivery, the only result is, that in such a case there cannot be a *donatio mortis causa*; and a release, without valuable consideration therefor, must be by testament, or by some instrument of writing which would be effectual for the purpose *inter vivos*."

is made by parol, and the article not delivered, it cannot be a gift *causa mortis*, nor one *inter vivos* either.¹ There cannot be a valid gift *causa mortis* without an actual transfer of the possession of the property.² If the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis causa*, for in fact it is a legacy, and the writing will be held a testamentary document, and therefore, if not attested by witnesses, as directed by the wills statutes, it will be void as a testamentary document.³ The delivery must be made during the life of the donor.⁴ A good delivery is made where a chattel is actually given by the donor into the hands of the donee, or to some person as the agent or trustee of the donee.⁵ So the delivery of some means of obtaining the chattel is sufficient,—as the delivery of a key of a box is a good delivery of the contents,⁶ or a delivery of a receipt for a bond which is in the hands of another is a good delivery of the bond.⁷ Delivery of a chose in action is good by delivering some document essential to its recovery.⁸

¹ Tate v. Ilbert, 2 Ves. Jr. 120.

² Daniel v. Smith, 64 Cal. 346.

³ Rigden v. Vallier, 2 Ves. Sr. 258.

⁴ Gilmore v. Whitesides, Dud. Eq. 14; 31 Am. Dec. 563.

⁵ Snell's Equity, 161; Michner v. Dale, 23 Pa. St. 59; Sessions v. Moseley, 4 Cush. 87; Gass v. Simpson, 4 Cold. 288; Borneman v. Sedlinger, 15 Me. 429; 33 Am. Dec. 626; Martin v. Funk, 75 N. Y. 134; 31 Am. Rep. 446; Drury v. Smith, 1 P. Wms. 404; Caldwell v. Renfrew, 33 Vt. 213; Jones v. Dever, 16 Ala. 221; McGillicuddy v. Cook, 5 Blackf. 178; Gourley v. Linsenbighler, 51 Pa. St. 345; Wells v. Tucker, 5 Binn. 366; Grymes v. Hone, 49 N. Y. 17; 10 Am. Rep. 313; Dole v. Lincoln, 31 Me. 422; Waring v. Edmonds, 11 Md. 424; McDowell v. Murdock, 1 Nott & McC. 237; 9 Am. Dec. 684; Clough v. Clough, 117 Mass. 83; Gardner v. Merritt, 32 Md. 78; 3 Am. Rep. 115. But a delivery to an agent of the donor, and not an agent

of the donee, is insufficient: Farquharson v. Cave, 2 Coll. C. C. 367; Walter v. Ford, 74 Mo. 195; 41 Am. Rep. 312.

⁶ Jones v. Selby, Prec. in Chanc. 300; Vandermark v. Vandermark, 55 How. Pr. 408. *Contra*, Hatch v. Atkinson, 56 Me. 324; 96 Am. Dec. 464. In Miller v. Jeffries, 4 Gratt. 479, the court say: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or if the thing be in action, of the instrument by using which the chose is to be reduced into possession, as a bond, or a receipt, or the like."

⁷ Elam v. Keen, 4 Leigh, 333; 26 Am. Dec. 322.

⁸ Moore v. Darton, 4 De Gex & S. 519.

Bonds, notes, and mortgages may be the subject of a gift *causa mortis*, without a more formal transfer than would be required in the case of chattels generally.¹ A promissory note may pass as a gift *causa mortis* without actual delivery to the donee, when such note is in the possession of a third party as trustee for the equitable owner.² A special deposit in a bank may be the subject of a valid gift *causa mortis*, by giving a check for the amount without a delivery of the negotiable certificate of deposit to the donee.³ But the delivery must be as perfect and complete as the nature of the article or property admits of.⁴ And the fact that the property is out of reach of the would-be donor, so that delivery is impossible, is entirely immaterial; the gift cannot be sustained in the absence of a delivery, whether delivery is possible or not.⁵ The delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causa*.⁶ So, also, will the delivery of a promissory note, payable to order, though not indorsed.⁷ A bond may be given without any written assignment.⁸ And the delivery of a certificate of deposit on a life insurance company has been held to be

¹ Kiff v. Weaver, 94 N. C. 274; 55 Am. Rep. 601.

² Southerland v. Southerland, 5 Bush, 591.

³ Kurtz v. Smither, 1 Demarest, 399.

⁴ Turner v. Brown, 6 Hun, 333; Hitch v. Davis, 3 Md. Ch. 266; Brown v. Brown, 18 Conn. 414; 46 Am. Dec. 328; Pope v. Randolph, 13 Ala. 214; Carridine v. Collins, 7 Smedes & M. 428; Blakey v. Blakey, 9 Ala. 391; Hillebrant v. Brewer, 6 Tex. 45; 55 Am. Dec. 757; Powell v. Leonard, 9 Fla. 359; Hatch v. Atkinson, 56 Me. 324; 96 Am. Dec. 464, the court saying: "Although delivery of the key of a warehouse, or other place of deposit where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest, or box in which valuable articles are kept, which are

capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is, that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery."

⁵ Case v. Dennison, 9 R. I. 88; 11 Am. Rep. 222.

⁶ Duffield v. Elwes, 1 Bligh, N. S., 497.

⁷ Veal v. Veal, 27 Beav. 303; Coutant v. Schuyler, 1 Paige, 316; Ashbrook v. Ryon, 2 Bush, 228; 92 Am. Dec. 481; Westerlo v. De Witt, 36 N. Y. 340; 93 Am. Dec. 517.

⁸ Waring v. Edmonds, 11 Md. 424; Walsh v. Sexton, 55 Barb. 251; Duffield v. Elwes, 1 Bligh, N. S., 497.

effectual, without a written assignment, to transfer the deposit itself to the donee, as a gift *causa mortis*.¹ A deposit in a savings bank may be the subject of a valid gift *causa mortis*, and such gift may be proved by the delivery of the bank or pass book to the donee, accompanied by an assignment;² or it may be proved by the simple delivery of the pass-book, without any assignment.³ A bond or sealed note delivered as a gift *causa mortis* will not be transferred to the donee so as to vest title in him, unless it is properly transferred by indorsement also; and where the gift was made simply by a transfer of possession, its value may be recovered at law in an action of trover by the personal representatives of the donor.⁴ A draft does not operate as an assignment until accepted, although drawn for a specific sum and against funds of the drawer in the hands of the drawee. The delivery of such draft unaccepted is therefore inoperative as a gift in view of death; and the draft cannot be enforced against the personal representatives of the drawer.⁵ And the delivery must be absolute,—the owner must part with all dominion over the gift.⁶

¹ *Westerlo v. De Witt*, 36 N. Y. 340; 93 Am. Dec. 517.

² *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272.

³ *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Turner v. Boston etc. Savings Bank*, 129 Mass. 425; *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231; *Tillinghast v. Wheaton*, 8 R. I. 536; 5 Am. Rep. 621; 94 Am. Dec. 126; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Penfield v. Thayer*, 2 E. D. Smith, 305. *Contra*, *Ashbrook v. Ryon*, 2 Bush, 228; 92 Am. Dec. 481.

⁴ *Overton v. Sawyer*, 7 Jones, 6; 75 Am. Dec. 444.

⁵ *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352.

⁶ In *Hawkins v. Blewitt*, 2 Esp. 663, A, being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house, to be delivered to the defendant, giving no further directions respecting it. On the next day the defendant brought the key of the box to A, who desired it to be taken back, saying he should want a pair of breeches out of it. This was held not to be a good *donatio mortis causa*, and the judge said: "In the case of a *donatio mortis causa*, possession must be immediately given; and also, in parting with the possession, it is necessary that the owner should part with the dominion over it. . . . It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself."

ILLUSTRATIONS.—On a loan, the borrower had given the lender a receipt in the following terms: "Received of Miss D. five hundred pounds, to bear interest at five per cent per annum." *Held*, that a delivery of the receipt to an agent of the borrower by the creditor on her death-bed, stating that she wished the debt to be canceled, was a good *donatio mortis causa*: *Moore v. Darton*, 4 De Gex & S. 519. The key of a room containing furniture was delivered to the donee. *Held*, a good gift *causa mortis* of the furniture: *Smith v. Smith*, Strange, 955. At the direction of her aunt, four days before her death, the plaintiff took the aunt's savings-bank book, and the aunt said: "Keep this, and if anything happens to me, bury me decently, and put a head-stone over me, and pay my debts, and anything that is left is yours." *Held*, a valid gift, coupled with the trust: *Curtis v. Portland Savings Bank*, 77 Me. 151; 52 Am. Rep. 750. A father bought a ticket in a lottery which he declared he gave to his daughter, and wrote her name upon it. After the ticket had drawn a prize he declared that he had given the ticket to his child, and that the prize-money was hers: *Held*, a valid gift *causa mortis*: *Grangiac v. Arden*, 10 Johns. 292. A. held certain notes of D., who was her grandson. One night, shortly before her death, she destroyed the notes, and subsequently made frequent declarations to the effect that she did not wish D. to pay them after her death. *Held*, a valid *donatio mortis causa*: *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285. On a slate by the bedside of E., who was found dead, was, in her writing, and signed by her, the following: "I wish Dr. L. to take possession of all, both personal, real, and mixed. I am so sick I believe I shall die. Look in valise." In a valise was found a memorandum written by her, directing Dr. L. to take all of her property. *Held*, a valid gift *causa mortis* of personal property: *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178. A person at sea, being seized with cholera, sent for the purser, and in his presence, holding in his hand a bag of gold-dust and some pieces of coin, requested a sailor in attendance to hand it to the purser, which was done. The latter inquired who he wished to have his effects, to which the former replied, his sister and brother residing in Philadelphia. The purser testified that the gold-dust and coin were given to him in presence of the donor and at his request, and he wished his brother and sister to have it. About six hours after the occurrence the sick man died of the said disease. *Held*, that this was a *donatio causa mortis* in favor of the brother and sister: *Michener v. Dale*, 23 Pa. St. 60. C., about a month before her death, deposited a sum of money with B., and took his receipt therefor. On the morning of the day of her death she handed the receipt to B. at her bedside, saying that she gave that to

him; she also mentioned the amount at the foot of the paper, saying she gave that amount. *Held*, that the transaction amounted to a valid gift *causa mortis*: *Champney v. Blanchard*, 39 N. Y. 111. A person in his last illness executed a writing, attested by two subscribing witnesses, in which the names of several of his children and grandchildren were written, to whom he gave his estate, consisting principally of money and cash notes, with the amount each one was to have set opposite his or her name, and delivered the paper to his two sons to keep, and the property also, and charged them with the execution of the trust. *Held*, that this was a valid *donatio causa mortis*: *Kemper v. Kemper*, 1 Duvall, 401. A husband, a few days before his death, and in his last sickness, destroyed a bond executed to him by his wife on account of her separate estate, declaring his intention to forgive the debt. *Held*, to be a discharge of the debt: *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340. An administratrix, the widow of the deceased, received from her husband a paper just before his death, with the instruction: "You will need some money; get the one thousand dollars from A. Pay sickness and burial expenses, and keep the rest for yourself." After the husband's death the widow took the paper to A, received the money, and paid expenses. *Held*, that the balance left was a gift to her, although she did not have the money during deceased's lifetime: *In re Cronan*, Myrick's Probate, 72. A testator before his death delivered to one of the executors named in his will a sum of money to be distributed among his servants, for whom he said that he had neglected to provide. The executor notified some of the servants of the gifts to them, and paid them after the decease of the testator. *Held*, a valid *donatio causa mortis*: *In re Barclay*, 11 Phila. 123. A delivery by A to B of the key of a desk containing evidence as to notes due A, and of a letter from A's agent, the custodian of the notes, describing them, coupled with an expression of the donor's intention to give the notes to B, *held*, to make a gift *causa mortis*: *Stephenson v. King*, 81 Ky. 425; 50 Am. Rep. 172. A woman eighty years old agreed to convey land to a nephew, he to pay as stipulated. Three years afterwards, she, being sick and expecting to die, had a deed prepared, and requested that it be delivered to him after her death, and being annoyed by the importunities of other nephews and nieces, the deed at her request was delivered to him. She recovered. *Held*, a gift *causa mortis*, and not *inter vivos*, and therefore revocable by her: *Curtiss v. Barrus*, 38 Hun, 165. The donor told A that certain notes, which she pointed at in a basket, were for B, and certain others for C, and directed A to take them to D for safe-keeping, and said that these notes and the will would make the children all equal. *Held*, a valid gift *causa mortis*: *Shackleford v. Brown*,

89 Mo. 546. The delivery was made by the donor to the donee of a key of a trunk containing money and government bonds. *Held*, not a valid delivery of the money and bonds: *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464. The donor had certain bonds and notes brought out of his chest and laid on his bed. He then caused them to be sealed up in packages, the amount of the contents written on them, with a statement, "For Mrs. C.," "For Miss C." This being done, he directed that they should be returned to the chest; that the chest should be locked, the keys sealed up, and the keys to be delivered to one J. after his decease. *Held*, that the gift was invalid for want of delivery: *Bunn v. Markham*, 7 Taunt. 224. The donor told one A to take the keys of his dressing-case, and box containing her watch and trinkets, and immediately on her death to deliver the watch and trinkets to the plaintiff. A acted accordingly. *Held*, that the gift was incomplete for want of delivery: *Powell v. Hellicar*, 26 Beav. 261. A, who held a note of C to him, indorsed it to B, stating that he wished her, B, to have and collect it. There was no delivery of the note. *Held*, not a good gift *causa mortis*: *Weston v. Hight*, 17 Me. 289; 35 Am. Dec. 250. A woman, who had money on deposit in the savings bank, during her last sickness told a girl who lived with her, and had the custody of her bank-book, to get the book, which being done, she said, "Take that and keep it and lock it up." The girl retained the book. *Held*, not sufficient to establish a gift *causa mortis*: *Fiero v. Fiero*, 5 Thomp. & C. 151; 2 Hun, 600. S., being ill, gave C. a written order on a savings bank for the payment to C. of a deposit standing in the bank in the name of S. A memorandum was subjoined that "the book must be sent with this order," the book being in the possession of G. S. at the same time gave C. a written order for it. C. presented the order for the money to the bank without the book, and the bank refused to pay it without the production of the book. S. died three months later, at a different place, but whether of the same disease did not appear. In an action by C. against the administrator of S. for the deposit, it not appearing that C. ever had the book, or ever tried to get it, *held*, there could be no recovery: *Conser v. Snowden*, 54 Md. 175; 39 Am. Rep. 368. A father, about a week before his death, put a package of money in the hands of his son to take care of it for him, and some three days before his death told his son in case he should not recover to pay the funeral expenses and divide the balance between himself and certain of his brothers and sisters. *Held*, not a gift: *McCord v. McCord*, 77 Mo. 166; 46 Am. Rep. 9. J. H., being in feeble health, made a deposit in a savings bank to the credit of himself and mother, and the survivor of them, subject to the order of either. He subsequently went to the bank, accompanied by

his sister, and had the name of the mother erased, and that of the sister substituted, so that the account was to the credit of J. H. and his sister, "and the survivor of them, subject to the order of either." This money constituted nearly all his property. After this he drew out fifty dollars. He kept possession of the bank-book until his death. After the deposit, he made a will, dividing his property among his relatives, to carry out the provisions of which would require the sum deposited. *Held*, that there was no gift *causa mortis* of the deposit. Nor was there sufficient to establish a trust therein in favor of the sister: *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486. A certificate of deposit as follows: "Evansville National Bank, Evansville, Ind., Sept. 8, 1875. H. M. Chaney has deposited in this bank \$23,514.70, payable in current funds to the order of himself, on the surrender of this certificate properly indorsed, with interest at the rate of six per cent per annum if left for six months. Henry Reis, Cashier," — *held*, to be the subject of a valid gift, if properly indorsed and delivered to the donee. But where it was indorsed, "Pay to Martin Basket, of Henderson, Ky. No one else; then not till my death. My life seems to be uncertain; I may live through this spell. Then I will attend to it myself. H. M. Chaney," and delivered to the donee, *held*, not valid as a *donatio causa mortis*, because to take effect only upon the death of the donor: *Basket v. Hassell*, 107 U. S. 602. B made a deposit in a savings bank in the name of C, his grandchild, but payable to himself, and took a deposit-book, which he kept and controlled. He drew out more than half the deposit, and afterwards had the first entry modified so that the deposit was payable to him during his life, and after his death to C. In his will previously made he confirmed all gifts made or to be made to his children. There was no other evidence of any trust. The deposit could not be withdrawn without the production of the book. C had no knowledge of the transaction. *Held*, neither a gift nor a trust: *Pope v. Burlington Savings Bank*, 56 Vt. 284; 48 Am. Rep. 781. While on his death-bed, and about three hours before his death, W. told the attending nurse that his pocket-book was "under the bed, just under his shoulders," and requested her to take it and give it to his wife, when she came, with the money and papers contained in it. Several hours after his death, the nurse, for the first time, took the pocket-book, and gave it to another person, with directions to give it to the widow if she came, or send it to her if she did not come. *Held*, not a valid gift: *Wilcox v. Matteson*, 53 Wis. 23; 40 Am. Rep. 754. S., in anticipation of death, said that she gave her uncle her money, and that it was all his. She died soon after. The uncle had from time to time received money from her, deposited it in a savings bank, and retained the bank-book in his posses-

sion. *Held*, that there was not a valid *donatio mortis causa*, as there was no evidence of any delivery of the book or money to the uncle at the time the gift was made: *French v. Raymond*, 39 Vt. 623. The deceased, in his last illness, expressed a desire to his daughter that she should have his carriage and horses; but it did not appear that there had been any actual change of possession, though they were used by her afterwards, and the coachman received his orders from her. *Held*, not such a delivery by the donor to the donee as was necessary to complete the gift: *Delmotte v. Taylor*, 1 Redf. 417. S., being informed of his approaching death, told his attendants that he had sixteen hundred dollars in bank, nine hundred and fifty dollars under his pillow and in his coat-pocket, and several hundred dollars in the hands of different persons; that he desired two hundred dollars to go to a niece, and one hundred dollars to an old servant, and the rest to his wife. One of the attendants then found and counted the nine hundred and fifty dollars, to the knowledge of S.; but he gave no further directions. *Held*, not a gift: *Newton v. Snyder*, 44 Ark. 42; 51 Am. Rep. 587. The deceased gave his daughter the furniture in his rooms, the keys of which were given her by her husband, and she subsequently removed the furniture to her residence, though nothing else appeared showing she took possession of it with the donor's knowledge and assent. *Held*, not sufficient to consummate the gift: *Delmotte v. Taylor*, 1 Redf. 417. The intestate, who had a deposit in a savings bank in her name, but had never had the bank-book in her possession, said to defendant, in her last sickness, that she wanted him to get the book and divide the money among himself and two others. *Held*, not a valid gift for want of delivery: *Case v. Dennison*, 9 R. I. 88; 11 Am. Rep. 222. A man, just before dying, called those of his children who were near him, and said to one of them: "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children." The child so addressed took the key to the box. The notes comprised the bulk of the property. *Held*, not a good gift *causa mortis*: *Gano v. Fisk*, 43 Ohio St. 462; 54 Am. Rep. 819. A, who had quarreled with his wife during his last illness, and about two weeks before his death, indorsed over to B bonds worth twenty-two thousand dollars, and constituting nineteen twentieths of A's personal estate. There was no evidence of a delivery, and the bonds were found, after A's death, among his effects. *Held*, not a gift, and that A's widow was entitled to her distributive share in the bonds: *Seabright v. Seabright*, 28 W. Va. 412.

§ 1336. **Acceptance Essential.**—The acceptance of the gift by the donee is also essential, in order to make a

donatio causa mortis complete or perfect.¹ But acceptance may be presumed in cases where it would be beneficial to the donee.²

§ 1337. **Other Requisites.**—The gift does not (like a legacy) require witnesses.³ Nor is there any limitation to the amount of property one may so dispose of.⁴ Thus a married woman's gifts *causa mortis* are not limited by the statutory limit as to the amount of property she may leave by will.⁵ The title to a gift *causa mortis* passes by the delivery, defeasable only in the lifetime of the donor.⁶ A *donatio causa mortis* is of the nature of a legacy. It becomes valid only upon the decease of the donor.⁷ If a will is made after a *donatio causa mortis*, the *donatio* is set aside.⁸ A gift by a man in his last sickness to a person in attendance upon him will be viewed with suspicion, and will not be sustained without full and conclusive evidence.⁹

§ 1338. **Other Methods of Obtaining Title to Chattels.**—Other methods of obtaining title to chattels are discussed in other portions of this work.¹⁰

¹ *Delmotte v. Taylor*, 1 Redf. 417; *Armitage v. Wedoe*, 35 Mich. 124; *De Levillain v. Evans*, 39 Cal. 120.

² *Goss v. Singleton*, 2 Head, 67; *Highman v. Stewart*, 38 Mich. 513; *De Levillain v. Evans*, 39 Cal. 120; *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285.

³ *Irish v. Nutting*, 47 Barb. 370.

⁴ *Michener v. Dale*, 23 Pa. St. 59; *Meach v. Meach*, 24 Vt. 591. But see *Headley v. Kirby*, 18 Pa. St. 326.

⁵ *Marshall v. Berry*, 13 Allen, 43.

⁶ *Emery v. Clough*, 63 N. H. 552; 56 Am. Rep. 543.

⁷ *Jones v. Brown*, 34 N. H. 439.

⁸ *Adams v. Nicholas*, 1 Miles, 90.

⁹ *Shirley v. Whitehead*, 1 Ired. Eq. 130.

¹⁰ As to the right to the increase of animals and the rights of the finders of lost animals and estrays, see the chapter on Animals, *post*; as to stolen chattels, see Contracts; as to lost or stolen bills and notes and other negotiable instruments, see Negotiable Instruments; as to title by purchase and sale, see Contracts; as to title by descent and devise, see the titles Wills and Descent.

CHAPTER LXX.

THE KINDS OF PERSONAL PROPERTY.

- § 1339. The different kinds of personal property — Chattels real and chattels personal — Corporeal and incorporeal.
- § 1340. Animals.
- § 1341. Annuities.
- § 1342. Copyrights, trade-marks, and patents.
- § 1343. Corpses — Dead bodies — Burial — Cemeteries.
- § 1344. Fixtures — Things attached to the freehold.
- § 1345. Ice.
- § 1346. Minerals.
- § 1347. Manure.
- § 1348. Salaries and pensions.
- § 1349. Ships and vessels.
- § 1350. Vegetables, fruits, etc.
- § 1351. Money, and evidences of indebtedness — Papers.
- § 1352. Debts and demands not evidenced by writing.
- § 1353. Other kinds of chattels.

§ 1339. The Different Kinds of Personal Property — Chattels Real and Chattels Personal — Corporeal and Incorporeal. — Personal property may be properly said to embrace all things which may be the subject of ownership, except real estate. It has two well-defined divisions, viz., chattels real and chattels personal. Chattels real are interests in land which are less than a freehold, — such, for example, as a lease of real estate for a number of years.¹

Chattels personal take in a wide range. Under this designation fall all movables of every description; all those articles and things which the owner may carry with him from place to place;² all kinds of goods, wares, and merchandise which may be vended, worn, or consumed; animals, articles of use and ornament, the stove in a man's house, the desk in his office, the pen with which

¹ See *post*, Division III., Landlord and Tenant.

² *McLean v. Hardin*, 3 Jones Eq. 294; 69 Am. Dec. 740.

he writes his letters, the ring on his finger, the watch in his pocket, the goods on his shelves, the money in his till,—these are chattels personal. So are all debts and demands, the bills of a bank, the notes of a debtor, an annuity, a legacy, a loan, a share of stock in a corporation,—everything, in fact, which is a lawful demand, and is not a piece of the ground.¹

Chattels personal are of two kinds, namely, corporeal and incorporeal. Such things as one may see and touch are corporeal chattels; such as one cannot see and touch are incorporeal. The former are things; the latter are only rights. The common law, to distinguished between these two classes of chattels, more frequently uses the terms “choses in possession” and “choses in action.”²

§ 1340. **Animals.**—Animals are chattels personal, and are subject to most of the rules of law governing other species of personalty.³

§ 1341. **Annuities.**—A personal annuity—that is, the right to receive a periodical payment of money charged upon personal estate—is a species of incorporeal chattel personal.⁴ A personal annuity given by will is governed by the rules applicable to a devise of realty.⁵ A promise to pay an annuity in consideration of forbearance to sue the personal representatives of the grantor is binding, and may be enforced against the promisor.⁶ An annuity given by a will for the life of the annuitant, to be paid by the executors quarterly, but not charged upon the income merely, is valid.⁷ An annuity is often purchased, instead of being a gift; in such cases, it has been

¹ As to animals, see the next title, *Animals*; as to demands, choses in action, etc., see *Title Contracts, post*; as to negotiable paper, see *Title Negotiable Instruments*; as to shares of stock, see *Title Corporations, ante*, Division I.

² 1 Schouler on Personal Property, secs. 46–58.

³ See *post*, *Title Animals*.

⁴ 1 Schouler on Personal Property, sec. 66.

⁵ *Bradhurst v. Bradhurst*, 1 Paige, 331.

⁶ *Horton v. Cook*, 10 Watts, 124; 36 Am. Dec. 151.

⁷ *Gott v. Cook*, 7 Paige, 521.

held that inequality of price will not make the transaction usurious.¹ An annuity payable quarterly, or at other periods, is not apportionable if the annuitant dies in the middle of a quarter or other period.² Where there is no instructions as to when an annuity is to be paid, it is payable at the end of the year.³ Where an annuity is bequeathed payable out of the income of the estate, and the income fails, the principal must be resorted to.⁴

ILLUSTRATIONS.—A testatrix bequeathed the residue of her estate in trust for the benefit of her sister, the interest accruing from the same to be paid over to her every six months during her life. *Held*, that said sister took the interest of the residue from the death of the testatrix: *Weld v. Putnam*, 70 Me. 209. A provision in a will was for the payment of "five hundred dollars per year, for ten years, to" B, in equal quarterly installments. *Held*, to be an annuity contingent on B's life, and not a legacy of five thousand dollars payable in installments: *Bates v. Barry*, 125 Mass. 83; 28 Am. Rep. 207. An annuity was given by will to the wife of the testator, payable on the first day of March, and the testator died in August. *Held*, that the annuitant was entitled to the full annuity on the first day of the following March: *McLemore v. Blocker*, 1 Harp. Eq. 272. A testator died in September, having bequeathed "A five hundred dollars annuity," to be paid "on the first day of March in every year." *Held*, that upon the first day of March following the testator's death, the annuitant was entitled to a part of the annuity proportioned to the time elapsed after the testator's death: *Waring v. Purcell*, 1 Hill Ch. 193. A testator made his wife his residuary legatee, adding, "It is further my will and desire that" she pay "to my nephew L., for the purpose of educating him," commencing at a specified date, two hundred dollars "annually until said L. is of age." L. died two years afterwards, before arriving of age. *Held*, that the legacy ceased at L.'s death: *Anderson v. Hammond*, 2 Lea, 281; 31 Am. Rep. 612.

§ 1342. Copyrights, Trade-marks, and Patents.—Copyrights, trade-marks, and patents are chattels personal.⁵

¹ *Lloyd v. Scott*, 4 Pet. 205.

³ *Hall v. Hall*, 2 McCord Ch. 267.

² *Wiggin v. Swett*, 6 Met. 194; 39 Am. Dec. 716; *Heizer v. Heizer*, 71 Ind. 526; 36 Am. Rep. 202; *Tracy v. Strong*, 2 Conn. 657. *Aliter* by statute: *Irving v. Rankine*, 20 N. Y. Sup. Ct. 147.

⁴ *Delaney v. Van Aulen*, 21 Hun, 274.

⁵ See *post*, Title Copyrights, Trade-marks, and Patents.

§ 1343. Corpses—Dead Bodies—Burial—Cemeteries.—

It is generally held that a corpse is not a subject of property, nor can replevin be maintained for it.¹ But the relatives of a dead person have certain rights over the body which equity recognizes and will enforce.² The duty devolves on a man's executor to bury him in a manner suitable to his estate and means.³ As to the manner and form of the burial, the executor should obey the expressed reasonable wishes of the testator as to the disposition of the remains, even if it is not in accordance with the wishes of the next of kin.⁴ Where there is no expressed wish of a deceased as to the disposition of his remains, the wishes of the surviving husband or widow shall control, as against the next of kin.⁵ If a husband consented to the burial of his wife in a lot owned by another, but not freely, nor with the intention or understanding that it should be permanent, a court of equity may permit

¹ *State v. Doecke*, 68 Mo. 208; 30 Am. Rep. 785; *Secor v. Secor*, 31 Leg. Int. 268; *Griffith v. R. R. Co.*, 23 S. C. 25; 55 Am. Rep. 1. It has been held in Indiana (*Bogert v. Indianapolis*, 13 Ind. 138) that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as property within restrictions analogous to those by which the disposition of other property may be regulated. And see *In re Beekman Street*, 4 Bradf. 504.

² In *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, the court say: "Although the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform toward it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may, from family or friendship, have an interest in it, and we think that a court of equity

may well regulate it as such, and change the custody if improperly managed. So in the case of custody of children, certain persons are *prima facie* entitled to their custody, yet the court will interfere and regulate it. We think these analogies furnish a rule for such a case, and one which will probably do most complete justice, as the court could always interfere in case of improper conduct, e. g., preventing other relatives from visiting the place for the purpose of indulgence of feeling or testifying their respect or affection for the deceased."

³ *Wynkoop v. Wynkoop*, 42 Pa. St. 295; 82 Am. Dec. 506; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Hepgood v. Houghton*, 10 Pick. 154; *Campfield v. Ely*, 13 N. J. L. 150. As to the duty of husband and wife as to each other see, *ante*, Husband and Wife.

⁴ *Estate of Benison*, 31 Leg. Int. 196.

⁵ *Durell v. Hayward*, 9 Gray, 248; 69 Am. Dec. 284; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; 82 Am. Dec. 506; *Secor v. Secor*, 31 Leg. Int. 268.

him to remove her body, and the coffin and tombstones furnished by him, to his own land, and may restrain interference with such removal.¹

The legislature has a right to authorize the authorities of a city to remove the remains of the dead from cemeteries.² The right of burial in a public cemetery is a privilege or license to be enjoyed so long as the place continues to be used as a burial-ground, subject to municipal regulation, and revocable whenever the public necessity requires.³ The right of burial in a church-yard is a privilege enjoyable only so long as the ground continues a church-yard, and is subject to any right of the church to abandon it; and one who is merely a pew-holder, or has relatives buried in the yard, and has no contract relation with the church, cannot maintain the objection that an act of the legislature authorizing the removal of the dead from such church-yard impairs the obligation of a contract.⁴ The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil; and an act of the legislature, directing the vacation and sale of the cemetery, and the removal of the bodies, is not an unconstitutional infringement of his rights.⁵ The continuous and notorious use of land for twenty years as a public burial-place, with the acquiescence of the owner, affords presumptive evidence of its dedication for that purpose, and the owner is estopped from denying it, and will

¹ *Weld v. Walker*, 130 Mass. 422; 39 Am. Rep. 465.

² *Craig v. First Presb. Church*, 88 Pa. St. 42; 32 Am. Rep. 417. In New Jersey it has been held that the legislature cannot authorize municipal authorities to devote to other uses lands held by the city in trust forever for a burial-ground; *Stockton v. Newark*, 42 N. J. Eq. 531.

³ *Page v. Symonds*, 63 N. H. 17; 56 Am. Rep. 481.

⁴ *Craig v. First Presb. Church*, 88 Pa. St. 42; 32 Am. Rep. 417.

⁵ *In re Kincaid*, 66 Pa. St. 411; 5 Am. Rep. 377. While it is beyond the power of a legislature to prevent, for all time, the taking of cemetery property for a public road, yet if a general law permitting a taking of land generally can stand with a previous special law exempting the cemetery property, such construction will be given to it, and, the special law being unrepealed, the cemetery property may not be taken under the general law: *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 N. H. 141.

be enjoined from interfering with such use.¹ So if the owner of the land has consented expressly or by implication to an interment therein, he cannot afterwards deface or destroy the tombstone or remove the body.² A mortgage of a lot in a cemetery is void;³ a cemetery or graveyard cannot be sold for taxes for the improvements of adjacent streets;⁴ nor will the authorities be permitted to run streets through a cemetery without express authority.⁵ If the whole public have the right, on payment, to use a cemetery as a burial-place, land for an addition thereto may be condemned; otherwise if the cemetery is a private one.⁶ Where a lot in a cemetery is sold with reference to a certain plan, on which plan appears a certain avenue leading up to or close beside the lot, affording a convenient highway to and from it, that avenue becomes a servitude in favor of the lot, and cannot be legally obstructed, and the purchaser is entitled to injunction to protect him in his enjoyment of it.⁷ The owner of a lot in a cemetery cannot be interfered with by unreasonable regulations made by the association.⁸ But a person can only use a lot in conformity with the by-laws of the association, in so far as they do not violate the law.⁹ A public cemetery company cannot arbitrarily restrain a lot-

¹ *Boyce v. Kalbaugh*, 47 Md. 334; 28 Am. Rep. 464.

² *State v. Wilson*, 94 N. C. 1015.

³ *Thompson v. Hickey*, 59 How. Pr. 434; 8 Abb. N. C. 159. *Aliter*, it seems, if no interments have been made in it: *Lantz v. Buckingham*, 11 Abb. Pr., N. S., 64; 4 Lans. 484.

⁴ *Louisville v. Nevin*, 10 Bush, 549; 19 Am. Rep. 78. See *Olive Cemetery Assoc. v. Philadelphia*, 93 Pa. St. 129; 39 Am. Rep. 732.

⁵ *Trustees v. Walsh*, 57 Ill. 363; 11 Am. Rep. 21; *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234; 21 Am. Rep. 643.

⁶ *Evergreen Cemetery v. Beecher*, 53 Conn. 551.

⁷ *Burke v. Wall*, 29 La. Ann. 38; 29 Am. Rep. 316.

⁸ *Mount Moriah Cemetery Assoc. v. Com.*, 81 Pa. St. 235; 22 Am. Rep. 743. A by-law that lots shall not be transferred without the consent of the managers is valid and reasonable: *Com. v. Mount Moriah Cemetery Assoc.*, 10 Phila. 385. Or that only persons of a particular religion shall be interred there: *People v. St. Patrick's Cathedral*, 21 Hun, 184; or persons not Masons: *Id.* Where burial is refused without legal justification, *mandamus* will lie to compel it: *King v. Cole-ridge*, 2 Barn. & Ald. 806; *Mount Moriah Cemetery Assoc. v. Com.*, 81 Pa. St. 235; 22 Am. Rep. 743.

⁹ *People v. St. Patrick's Cathedral*, 21 Hun, 184; *Dwenger v. Geary*, 113 Ind. 106.

owner from building a suitable vault above ground on his lot where others have been permitted to do the same.¹ It is liable to the proprietor of a grave for the negligent burial of a stranger therein.² The purchaser of land on which is located a burial-ground may be enjoined from removing the bodies, against the wishes of those interested.³ One who erects grave-stones to the memory of another may maintain an action for an injury done to them during his lifetime. But after the decease of the one who reared them, the action for an injury thereto must be brought by the heirs of him to whose memory they were erected.⁴ A husband is not liable as trespasser for removing a grave-stone, placed there by his wife's mother, from the grave of his wife, whom he has buried in a public burying-ground, where he does not injure the stone, and holds it in possession ready to be delivered to the owner on demand, and causes the removal for the purpose of substituting another stone.⁵

ILLUSTRATIONS.—The dead body of plaintiff's wife was delivered to the defendants, who were physicians, for the purpose of dissecting the throat. The defendants promised to perform the operation in presence of the friends of deceased and to give the body a decent burial. The defendants retained the body upon some pretext longer than was necessary, and afterwards, upon demand of deceased's friends, returned the body in a rough box to the friends of deceased. The husband, who had been absent from home, returned and brought suit for laceration of feelings, expense of recovering the body, and for the fraud. *Held*, that the action was maintainable: — v. —, 4 Am. L. T. 127. A husband, with the full approval of his wife, was buried by his father in the latter's cemetery lot. *Held*, that the wife should be enjoined from removing his remains: *Peters v. Peters*, 43 N. J. Eq. 140. There was a controversy between a son and the widow for the possession of the remains of the father and husband, the son desiring to inter

¹ *Rosehill Cemetery Co. v. Hopkinson*, 14 Ill. 209.

² *Donnelly v. Boston etc. Cemetery Assoc.*, 146 Mass. 163.

³ *First Presb. Church v. Second Church*, 2 Brewst. 372; *Boyce v. Kalough*, 47 Md. 334; 28 Am. Rep. 464;

See *New York etc. Cemetery Co. v. Buckmaster*, 49 N. J. L. 449. But see *Hamilton v. New Albany*, 30 Ind. 482.

⁴ *Sabin v. Harkness*, 4 N. H. 415; 17 Am. Dec. 437.

⁵ *Durell v. Hayward*, 9 Gray, 248; 69 Am. Dec. 284.

them in a lot purchased by the deceased, in which lay the remains of a former wife and two children, and the widow proposing to place them in her father's lot, she having no children. *Held*, that the claim of the son should be preferred: *Snyder v. Snyder*, 60 How. Pr. 368. The deceased, at her request, and with the concurrence of all her children except one, was buried in her sister's lot. *Held*, that that one child or his executors could not remove her remains to another place of sepulture: *Lowrie v. Plitt*, 11 Phila. 303. A person, dying, was buried with the consent of his widow in a lot previously purchased by him. Afterwards, the widow, against the wishes of the decedent's only child, caused the remains to be removed to another cemetery. The child thereupon filed a bill for a decree that the corporation of the cemetery to which the removal had been made restore the body to the place whence it had been removed, and restraining the widow from again removing or meddling with said remains. On demurrer by the widow, *held*, that the court had jurisdiction of the matter, and that the allegations of the bill entitled the complainant to the decree: *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667. A statute authorized rural cemetery associations to acquire land by exercising the right of eminent domain. *Held*, that the use was a private one, and the statute, therefore, unconstitutional and void: *In re Deansville Cemetery Association*, 66 N. Y. 569; 23 Am. Rep. 86. The charter of a cemetery company authorized it to acquire and use land, not exceeding five hundred acres, for burial purposes. After it had acquired the land, and spent money in preparing and adorning the same, a statute was passed forbidding the company to use any of its lands for burial purposes outside of its then inclosure, which was less than five hundred acres. *Held*, that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the police power, and was unconstitutional: *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; 22 Am. Rep. 71. A by-law of a cemetery prohibited the burial of negroes there. *Held*, void as to lot-owners before its passage: *Mount Moriah Cemetery Association v. Com.*, 81 Pa. St. 235; 22 Am. Rep. 743. A bought a lot in a public cemetery owned by a city. In front of the lot, and shown on a plan referred to in his deed of the same, there was an avenue and a triangular space inclosed by lines. After A's purchase, the city built a wall and a terrace in this space, and closed the avenue. A then brought a bill in equity for an injunction to restrain the city from building the wall and terrace, and to compel it to restore the premises to their condition at the time of the purchase. The case was referred to a master, who found that the acts complained of were alterations made in good faith for the general improvement of

the cemetery; and not impairing the value of A's lot, or his means of access to it; that the pecuniary loss to A was nothing, and the injury or damage, if any, was wholly one of sentiment and temper; and that A had lain by and taken no other action than to protest while the city had expended in the work in question a large sum of money to the benefit of the cemetery; and that the cost of removing the wall and terrace would largely exceed the value of the plaintiff's interest in the premises. *Held*, that the bill could not be maintained: *Perkins v. Lawrence*, 138 Mass. 361. The plaintiff, as a member of a society, acquired an exclusive right of burial in a certain lot so long as the ground should remain a cemetery. The defendant, without his consent, buried a child in that lot. *Held*, that an action of trespass *quare clausum fregit* would lie, although the plaintiff had withdrawn from the society. The defendant's conduct being malicious, punitive damages were proper: *Smith v. Thompson*, 55 Md. 5; 39 Am. Rep. 409.

§ 1344. Fixtures — Things Attached to the Freehold.— All buildings upon land, and other structures, are regarded as part of the realty, and are not chattels personal. They are called "fixtures."¹ A building while in transit from one lot to another is personalty;² but when reaffixed, it again becomes realty,³ unless originally severed by a trespasser and attached to his own soil.⁴ A building erected under an agreement with the owner of the land that the builder shall have the right to remove it is personalty.⁵ Millstones put into a mill will continue personal property, removable by the owner, there being an agreement for such removal; and the agreement may be enforced notwithstanding a change of ownership in mill and freehold.⁶

ILLUSTRATIONS. — An ice-house was erected under an oral agreement with the owner of the land, and built on stones and posts. *Held*, personal property, removable at the option of the builder: *Ham v. Kendall*, 111 Mass. 297, and see *Corwin v. Moorhead*, 43 Iowa, 456; *Sagar v. Eckert*, 3 Ill. App. 412. **A**

¹ See *post*, Title Fixtures.

² *Huebschmann v. McHenry*, 29 Wis. 655.

³ *Salter v. Sample*, 71 Ill. 439; *Northrup v. Trask*, 39 Wis. 515.

⁴ *Huebschmann v. McHenry*, 29 Wis. 655.

⁵ *Priestley v. Johnson*, 67 Mo. 632;

Evans v. McLucas, 15 S. C. 67; *Curtis v. Hoyt*, 19 Conn. 154; 48 Am. Dec. 149.

⁶ *Sullivan v. Jones*, 14 S. C. 362.

grain-elevator was built upon the right of way of a railroad, under a license given by the company, with the understanding that it was not to be a permanent structure, and it was operated by shafting from a steam-mill. *Held*, personal property: *Walton v. Wray*, 54 Iowa, 531. A owned a frame building sixteen by twenty feet, and one story high, used for county offices. A moved this building to the new county seat, upon B's land, upon an understanding that B should obtain a patent for the land and should convey it to the county, the building to become also the property of the county. B obtained his patent, but refused to convey the land. *Held*, that the building remained personalty and could be removed: *Rush Co. Commissioners v. Stubbs*, 25 Kan. 322.

§ 1345. **Ice.** — Ice belongs to the owner of the land under the water on which it is formed.¹ And he has the sole right to take ice formed upon the stream opposite his land. Neither is it a defense to a person taking such ice for the purpose of selling it that it is an obstruction to navigation.² The riparian owner may dam the stream in order to make a pond for ice, and he may drain such pond and hold back the water until he shall have cleaned out the pond in order that the ice may be pure; those below cannot complain of such use.³ But a riparian owner has no ownership of the ice on a navigable stream. It belongs to the first person appropriating it.⁴

¹ *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224; *Mill River Co. v. Smith*, 34 Conn. 462; *Paine v. Woods*, 108 Mass. 173; *Higgins v. Kusterer*, 41 Mich. 318; 32 Am. Rep. 160; *Myer v. Whitaker*, 3 Abb. N. C. 172. In *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224, it was held that ice formed in a stream was a valuable article within those words in a criminal statute.

² *Washington Ice Co. v. Shortall*, 101 Ill. 46; 38 Am. Rep. 255.

³ *De Baun v. Bean*, 29 Hun, 236.

⁴ *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, the court saying: "Where there is no ownership of the subjacent soil, a riparian proprietor has no title to the ice. The title to the soil being in the state, and the stream being a

public highway, obviously the ownership of the ice would vest in the general public, or in the state as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It is simply this, that his land joins the land of the state. The fact that it so joins gives him no title to that land, or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor. Undoubtedly, in view of the importance that ice is rapidly assuming as a merchantable commodity, it would be wise for the state to legislate in reference to the ice product of the navigable streams; but until such legislation is had, it would seem that the one

But ice-fields on navigable rivers, after being staked, fenced, and scraped, and in some instances connecting fields extending across the river, are so far the property of the appropriator that an action will lie against one who disturbs his right.¹ The legislature has authority to provide rules regulating the possession and cultivation of such ice.² As between the owner of the fee and the owner of an easement, the ice on a pond belongs to the former.³ The owner of land overflowed by a dam may remove and take ice formed over his land, if he does not perceptibly injure the mill-owner.⁴ The owner of a mill-dam on an unnavigable stream, who maliciously and unnecessarily draws off the water on a pond above, destroying an ice-field, is liable to the riparian owner of the land under the pond.⁵ All persons have a right to travel over the ice upon a river. If travelers have made a path on it, no one has a right to cut a hole there for the purpose of watering cattle, or any other, and one who does so will be liable for an injury caused thereby.⁶ Appropriators of ice on navigable rivers must guard their fields from danger to persons who may be likely to innocently intrude upon them.⁷

A sale of ice not yet cut is a sale of personalty.⁸ The

who first appropriates and secures the ice which is formed is entitled to it, and on the same principle that he who catches a fish in one of those rivers owns it": *Hickey v. Hazard*, 3 Mo. App. 480. *Gage v. Steinkräuss*, 131 Mass. 222; *Rowell v. Doyle*, 131 Mass. 474. *Contra*, *Washington Ice Co., v. Shortall*, 101 Ill. 46; 40 Am. Rep. 176.

¹ *Woodman v. Pitman*, 79 Me. 456; 1 Am. St. Rep. 343.

² *Woodman v. Pitman*, 79 Me. 456; 1 Am. St. Rep. 342.

³ *Brookville etc. Hydraulic Co. v. Butler*, 91 Ind. 134; 46 Am. Rep. 580.

⁴ *Doge v. Berry*, 26 Hun, 246.

⁵ *Stevens v. Kelley*, 78 Me. 445; 57 Am. Rep. 813.

⁶ *French v. Camp*, 18 Me. 433; 36 Am. Dec. 728.

⁷ *Woodman v. Pitman*, 79 Me. 456; 1 Am. St. Rep. 343.

⁸ *Higgins v. Kusterer*, 41 Mich. 318; 32 Am. Rep. 160, the court saying: "The sale to Higgins was not a sale of such ice as might from time to time be formed on the pond, but of ice which was there already, and which, if not cut, would disappear with the coming of mild weather, and have no further existence. It was not, like crops or fruit, connected with the soil by roots or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition, would lose its identity by melting. In its frozen condition it drew nothing from the land, and got

measure of damages for taking ice from a stream, the plaintiff having the exclusive right to such ice, is its value as soon as it existed as a chattel, that is, when scraped, plowed, sawed, cut, and severed, and ready for removal.¹

ILLUSTRATIONS. — The owner of a beer-room and an ice-room connected by slides gave a chattel mortgage on it to defendant, and a bill of sale of the ice in the ice-room to plaintiffs. Defendant stored beer in the beer-room, and gave plaintiffs notice to remove the ice, which they did not do, nor did they ever demand it from defendant. Defendant opened the slides between the two rooms, and allowed a current of air to pass over the ice and into the beer-room, cooling the beer, and causing a more rapid melting of the ice than would otherwise have occurred. *Held*, that defendant is liable for the ice so destroyed: *Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262. A had constructed a boom in a river within which ice was forming, which he intended to cut and sell when deep enough. It had frozen to the depth of six inches, when B's boat, which was running in the river, came so near the boom that her swell broke up the ice, and the weather thereafter continuing mild, A was unable to fill his ice-houses. There was room in the river for the boat to have passed without injury. *Held*, that B was liable for the damages: *People's Ice Co. v. The Excelsior*, 44 Mich. 229. See *Hickey v. Hazard*, 3 Mo. App. 480. A, who had built a dam on a

no more support from it than a log floating on the water would have had. Its only value consisted in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed, it would disappear entirely. While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed, no skill can join it again to the

realty. It has no more organic connection with the estate than anything else has that can float upon the water. Any breakage may sweep it down the stream, and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place, or not at all, and can only be kept in existence by cold weather. In the present case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses, which no ingenuity of black-letter metaphysics could annex to the freehold."

¹ *Washington Ice Co. v. Shortall*, 101 Ill. 46; 38 Am. Rep. 255.

stream on his own land, obtained from the owner of the land above him the right to overflow his land without any limitation as to the use of the waters held back by the dam. *Held*, that A was entitled to the ice formed in the water overflowing the lands of the owner above him, and could recover the value of the ice which had been taken therefrom by a third person by permission of such owner: *Myer v. Whitaker*, 18 Alb. L. J. 128.¹ The owner of a pond executed a lease under seal, whereby he demised and let "the sole and exclusive right to cut and carry away" from his said pond "all such ice as can be so cut in form and shape to use either for private use or as merchandise"; and it contained a provision "that the lessor may cut all ice needed for his own use from and off said pond." *Held*, that the lessee acquired a valuable right to use or sell all such ice, except what the lessor needed for his private use; that he had a right of action against both the lessor who interfered with him and a stranger who cut ice from the pond: *Richards v. Gauffret*, 145 Mass. 486.

§ 1346. **Minerals.** — Soil dug from the land and placed on other land becomes a chattel.² Minerals are real property while in the earth, but as soon as they are dug out they become chattels personal.³ A stone split out and freed from its original connection in a ledge, but not

¹ This decision is in conflict with that of Emott, J., in *Marshall v. Peters*, 12 How. Pr. 218, where it was held that the party purchasing ice from the owner of a pond could not obtain an injunction against a trespasser who undertook to remove it. In that case it was said: "The water in a running stream can never become, in any such sense as was claimed on the argument, the property of a riparian proprietor, even if he owns both banks and the stream passes wholly through his lands. All the property that a man can acquire in flowing water is a right to its use. He may have a certain right of property in it, but the water itself is not his property. He has a right to its natural flow, and to use it for his cattle, or his household, or upon his mill-wheels. But he cannot stop its current, nor divert its flow, nor increase or diminish it in any appreciable quantity. He must allow the waters to pass out of his hands as they enter

them, and his only right is a right to use them as they flow."

² *Northam v. Bowden*, 11 Ex. 70; *Lacustrine Co. v. Lake Guano Co.*, 82 N. Y. 476.

³ *Lykens etc. Co. v. Dock*, 62 Pa. St. 232; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617. The New York statute providing that oil-wells and fixtures on lands leased for oil purposes, and oil interests and rights held under lease, contract, or license, shall be deemed personal property, has no application to an estate carved out of the fee, whereby the land is granted, but the oil, gas, and minerals are reserved, with the exclusive right to dig, mine, operate, etc.; the interest thus reserved is a chattel real: *Richburg Bank v. Dow*, 41 Hun, 13. The right to mine, to enter land, dig for and remove ore, is an incorporeal hereditament: *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305; *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202.

removed away from the place, does not necessarily pass by a deed of the land from which it has been severed. If severed for the purpose of being used upon the land, it will so pass; but if severed in order to be removed and used elsewhere, it will not.¹

ILLUSTRATIONS.—The lessee leased coal mines with the “right to mine, carry away, and dispose of the” coal mined. The lessee having mined coal which remained in the mine just as it fell made an assignment for the benefit of his creditors. *Held*, that the coal was personal property, and passed to the assignee: *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232. The plaintiffs had a mining lease and raised ore, which being unwashed was mixed with the earth and left on the banks of the premises. *Held*, that replevin would lie for its possession unwashed notwithstanding the adhesion of the earth: *Green v. Ashland Iron Co.*, 62 Pa. St. 97.

§ 1347. **Manure.**—Manure is personal property, where it is lying upon the earth, but not incorporated with the soil.² A distinction is made in the case of manure on a farm. If made on a farm, it is regarded as part of the realty;³ as, if it is taken from the barn-yard of the homestead, and is standing in a pile on the land, although not broken up nor rotten, nor in a fit state for incorporation with the soil.⁴ In such cases trover lies for it, if severed from the freehold and carried to other premises.⁵ But the character of personalty is attributed to manure made in a livery-stable, or in any manner not connected with agriculture, or not in a course of husbandry;⁶ and the same has been asserted of manure from a hotel-stable, though afterwards spread upon the land in the usual course of husbandry.⁷ The right of an outgoing mortgagor after condition broken to the manure produced upon a farm

¹ *Noble v. Sylvester*, 42 Vt. 146.

² *Pinkham v. Greer*, 3 N. H. 484; *Haslem v. Lockwood*, 37 Conn. 500; 9 Am. Rep. 350; *Fletcher v. Herring*, 112 Mass. 384.

³ *Middlebrook v. Corwin*, 15 Wend. 169; *Daniels v. Pond*, 21 Pick. 367; 32 Am. Dec. 269.

⁴ *Fay v. Muzzey*, 13 Gray, 53; 74 Am. Dec. 619.

⁵ *Stone v. Proctor*, 2 Chip. (Vt.) 108.

⁶ *Daniels v. Pond*, 21 Pick. 372; 32 Am. Dec. 269; *Snow v. Perkins*, 60 N. H. 493; 49 Am. Rep. 333.

⁷ *Fay v. Muzzey*, 13 Gray, 53; 74 Am. Dec. 619.

in the ordinary course of husbandry by him pending the mortgage, and while in possession of the mortgaged premises, is to be determined by the rule of law which prevails between mortgagor and mortgagee, and not that which prevails between landlord and tenant. The general rule that manure made upon a farm in the usual course of husbandry is so attached to and connected with the realty that, in the absence of any agreement or stipulation to the contrary, it passes as appurtenant to it, is applicable to a mortgagor in possession. He has no right when vacating the premises to remove or sell such manure, but the title thereto is vested in the mortgagee as the owner of the freehold.¹

§ 1348. **Salaries and Pensions.**—The right to receive a salary for services which are being performed, or the right to receive a pension for services which have been done, are each a species of incorporeal chattel personal.²

§ 1349. **Ships and Vessels.**—Ships and vessels are chattels personal.³

§ 1350. **Vegetables, Fruit, etc.**—Vegetables become chattels when they are severed from the ground.⁴ Trees become chattels when they are cut down;⁵ so does turpentine from the tree when it is run into boxes.⁶ Thus the wild berry when picked becomes a chattel.⁷ Slabs, sawdust, shavings, and other refuse used to fill up low or marshy ground are realty, but slabs and pieces of lumber suitable for fire-wood piled up on land, and intended to be used and removed as fire-wood, are personalty.⁸

¹ Chase v. Wingate, 68 Me. 204; 28 Am. Rep. 36.

² Schouler on Personal Property, sec. 66.

³ See *post*, Title Ships and Shipping.

⁴ 1 Schouler on Personal Property, sec. 53. Wood cut and corded, and separated from the land when sold, is movable, and does not pass to the

purchaser: Woodruff v. Roberts, 4 La. Ann. 127.

⁵ Yale v. Seely, 15 Vt. 221.

⁶ Branch v. Morrison, 5 Jones, 16; 69 Am. Dec. 770.

⁷ Freeman v. Underwood, 66 Me. 229.

⁸ Jenkins v. McCurdy, 48 Wis. 628; 33 Am. Rep. 841.

§ 1351. **Money, and Evidences of Indebtedness — Papers.**—Money — i. e., gold and silver and copper coin issued by the government—is personal property.¹ So is a gold coin issued by a private person.² So is paper currency, as bank notes;³ negotiable instruments of any kind;⁴ or securities of any sort, negotiable or not; and, indeed, any valuable paper of whatever kind or description; evidences of indebtedness, as promissory notes,⁵ checks,⁶ drafts, or bills of exchange;⁷ and evidences of title, whether to things real, as deeds,⁸ or to things personal, as chattel mortgages;⁹ certificates,¹⁰ and it is sometimes held even shares,¹¹ of stock; an agreement or contract,¹² or a bond,¹³ or a policy of insurance,¹⁴ railroad stocks and bonds,¹⁵ an unlocated land certificate,¹⁶ a judgment or judgment roll,¹⁷ an execution,¹⁸ a book of records;¹⁹ documents and papers of various kinds, as exhibits at a trial,²⁰ vouchers and copies of a creditor's account,²¹ drawings, manuscripts, letters, and newspapers.²²

§ 1352. **Debts and Demands not Evidenced by Writings.**—The right to receive what is owing one, a demand

¹ 1 Schouler on Personal Property, sec. 54.

² *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739.

³ *Moody v. Keener*, 7 Port. 218. See also *Coffin v. Anderson*, 4 Blackf. 395.

⁴ *Componet v. Burr*, 5 Blackf. 419.

⁵ Though paid: *Pierce v. Gibson*, 9 Vt. 216; *Park v. McDaniels*, 37 Vt. 594; *Spencer v. Dearth*, 43 Vt. 98; *Kingman v. Pierce*, 17 Mass. 247; *Griswold v. Judd*, 1 Root, 221; *Stewart v. Martin*, 49 Vt. 266; *Seago v. Pomeroy*, 46 Ga. 227; *Todd v. Crookshanks*, 3 Johns. 432; *Netleton v. Riggs*, 1 Root, 125; *Stephenson v. Feezer*, 55 Ind. 416; *Donnell v. Thompson*, 13 Ala. 440; *Ninninger v. Banning*, 7 Minn. 274.

⁶ *Tilden v. Brown*, 14 Vt. 164.

⁷ *Tucker v. Jewett*, 32 Conn. 563; *Ayres v. French*, 41 Conn. 151.

⁸ *Day v. Whitney*, 1 Pick. 503.

⁹ *Stephenson v. Feezer*, 55 Ind. 416.

¹⁰ *Anderson v. Nicholas*, 28 N. Y. 600; *Atkins v. Gamble*, 42 Cal. 98; 10

Am. Rep. 282; *Von Schmidt v. Boum*, 50 Cal. 616.

¹¹ *Ayers v. French*, 41 Conn. 151; *Boylan v. Hugnet*, 8 Nev. 345; *Kuhn v. McAllister*, 1 Utah, 275; *Payne v. Elliot*, 54 Cal. 339; 35 Am. Rep. 80. *Contra*, *Neiler v. Kelley*, 69 Pa. St. 407.

¹² *Scott v. Jones*, 4 Taunt. 865.

¹³ *Bullock v. Rogers*, 16 Vt. 294.

¹⁴ *Harding v. Carter*, 1 Park on Insurance, 5.

¹⁵ *Huntzinger v. Philadelphia Coal Co.*, 11 Phila. 609.

¹⁶ *Porter v. Burnett*, 60 Tex. 220.

¹⁷ *Hudspeth v. Wilson*, 2 Dev. 372; 21 Am. Dec. 344; *Cabb v. Comegay*, 6 Ired. 358.

¹⁸ *Keeler v. Fassett*, 21 Vt. 539; 52 Am. Dec. 71.

¹⁹ *Stebbins v. Jennings*, 10 Pick. 172; *Sudbury v. Stearns*, 21 Pick. 148.

²⁰ *Yates v. Felton*, 48 Vt. 314.

²¹ *Fullam v. Cummings*, 16 Vt. 697.

²² *Teall v. Felton*, 1 N. Y. 537; 49 Am. Dec. 352.

against the estate of another, is an important kind of incorporeal chattel personal. Here we have a right of action against another for a breach of contract, or for an injury independent of contract.¹ In this class also fall the right to a legacy or distributive share,² the right to money deposited with a banker,³ an interest in a partnership.⁴

§ 1353. Other Kinds of Chattels.—The rolling stock of a railroad, such as its cars and locomotives, are chattels.⁵ So are title deeds, although so connected with and essential to the ownership of real estate that they descend with it to the heir.⁶ The good-will of a business is personal property.⁷ A seat in an exchange, transferable and of money value, is property.⁸ A license to retail liquor is not property.⁹ Nor is a mere idea, unconnected with any physical device, the subject of ownership.¹⁰

ILLUSTRATIONS.—A bill in equity alleged that there is a custom of the trade of booksellers and publishers in this country that when any person or firm engaged in that business has undertaken the printing, publication, and sale of a book not the subject of statute copyright, and has actually printed, published, and offered an edition of such book to the public for sale, other persons and firms in the same trade refrain from entering into competition with such publisher by publishing a rival edition of such book, and that the publication of such book becomes a good-will in the hands of the first publisher of the book. *Held*, that the alleged good-will rests upon no legal foundation, and cannot possess any legal value: *Sheldon v. Houghton*, 5 Blatchf. 285.

¹ 1 Schouler on Personal Property, sec. 59; *Ayres v. R. R. Co.*, 48 Barb. 132.

² 1 Schouler on Personal Property, sec. 63.

³ 1 Schouler on Personal Property, sec. 61.

⁴ *Tempest v. Kilner*, 2 Com. B. 300; 3 Dan. & Ll. 407.

⁵ 1 Schouler on Personal Property, sec. 56; *Beardsley v. Ontario Bank*, 31 Barb. 634. The rails are realty: *Hart v. R. R. Co.*, 7 Mo. App. 446; *Hunt v. Bay State Iron Co.*, 97 Mass. 283.

⁶ *Wilson v. Rybott*, 17 Ind. 391; 79 Am. Dec. 486.

⁷ *Boon v. Moss*, 70 N. Y. 465.

⁸ *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301; *Grocers' Bank v. Murphy*, 60 How. Pr. 426; *Ritterband v. Baggett*, 4 Abb. N. C. 67. In Illinois it has been held that an untransferable certificate of membership of a board of trade is not property: *Barclay v. Smith*, 107 Ill. 349; 47 Am. Rep. 437. So in Pennsylvania: *Thompson v. Adams*, 93 Pa. St. 55; *Pancoast v. Gowan*, 93 Pa. St. 66.

⁹ *Jones v. Motley*, 78 Ala. 370.

¹⁰ *Bristol v. Equitable Asso. Soc.*, 22 N. Y. St. Rep. 515.

CHAPTER LXXI.

DESTRUCTION OF PERSONALTY BY FIRE.¹

- § 1354. Fires — Liability in general.
- § 1355. In clearing land.
- § 1356. Statutory liability.
- § 1357. Liability of railroad for causing fires.
- § 1358. Duty of railroad as to construction of engine.
- § 1359. Duty of railroad as to keeping and management of engine.
- § 1360. Duty of railroad as to track and right of way.
- § 1361. Evidence of negligence.
- § 1362. Evidence of other and distinct fires.
- § 1363. Contributory negligence.
- § 1364. Statutory liability.

§ 1354. **Fires — Liability in General.**— A person is not liable for damage caused by a fire which commences on his premises, spreading to the property of another, in the absence of proof of some misconduct or negligence on his part,² the burden of proving which is on the

¹ As to fire insurance, see Title Insurance, *post*.

² *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Barnard v. Poor*, 21 Pick. 378; *Dewey v. Leonard*, 14 Minn. 153; *Jordan v. Wyatt*, 4 Gratt. 151; 47 Am. Dec. 720; *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63; *Grannis v. Cummins*, 25 Conn. 165; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Miller v. Martin*, 16 Mo. 508; 57 Am. Dec. 242; *Fahn v. Reichart*, 8 Wis. 255; 72 Am. Dec. 237; *Garrett v. Freeman*, 5 Jones, 78; *Averitt v. Murrell*, 4 Jones, 323; *Sturgis v. Robbins*, 62 Me. 289; *Hewey v. Nourse*; 54 Me. 257; *Scott v. Hale*, 16 Me. 326; *Tourtellot v. Rosebrook*, 11 Met. 460; *Maul v. Wilson*, 2 Harr. (Del.) 443; *Fraser v. Tupper*, 29 Vt. 409; *Clark v. Foot*, 8 Johns. 422; *Bennett v. Scutt*, 18 Barb. 347; *Bachelor v. Heagan*, 18 Me. 32. A tenant of part of a building, the other part of which is occupied by his landlord, and in both parts of which there are chattels of the landlord, is

liable for the accidental destruction of the landlord's part and its contents by fire, caused by his negligence in heating his own part; but he is not liable for the destruction of his own part, unless he was recklessly negligent; and as to the landlord's chattels in his own part, it depends upon the nature of his bailment: *Lothrop v. Thayer*, 138 Mass. 466; 52 Am. Rep. 286. At common law a person was liable for damages caused by a fire started by him, without regard to the question of negligence. By a statute of 6 Anne, c. 31, substantially re-enacted by 14 Geo. III., c. 78, it was provided that "no action, suit, or process whatever shall be had against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the twenty-fourth day of June, 1774, accidentally begin; nor shall any recompense be made by such person for any damage thereby, any law, usage, or custom to the contrary notwithstanding." This statute, it is held, does

plaintiff.¹ The happening of the fire or the destruction of the property does not raise a presumption of negligence.² So where fire is used for mechanical or manufacturing purposes, if used carefully and with proper safeguards, no liability attaches if it escapes and causes damage. It is a question of negligence.³

To negligently and carelessly expose one's property to fire, or to so carry on a business as to render the property of one's neighbor liable to destruction by fire, is a nuisance, which will be enjoined at the suit of such neighbor. In a Scotch case,⁴ the defendant erected a building with a thatched roof, and used it as a smith's forge, in the immediate vicinity of the plaintiff's residence and other thatched houses. The sparks falling upon the roofs from the chimney constantly exposed the plaintiff's property to damage from fire. The court restrained the defendant from using his building for that purpose. In another case,⁵ the defendant was the owner of an old house which had for a long time been unoccupied and was left open, and had become a resort for tramps and persons smoking pipes at all hours of the day and night. Being in the vicinity of other buildings, they were thereby exposed to imminent danger from fire. The city government directed its destruction as a nuisance. In an action

not include a fire caused by negligence: *Filliter v. Phippard*, 11 Q. B. 347. It has been held to be a part of the common law of New York; 1 *Thompson on Negligence*, 156. It does not include railroads; for they were unknown at the time of its passage: *Spaulding v. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550; *Vaughan v. R. R. Co.*, 3 Hurl. & N. 742; 5 Hurl. & N. 678.

¹ *Bachelor v. Heagan*, 18 Me. 32; *Sturgis v. Robbins*, 62 Me. 289; *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63; *Rosebrook v. Rosebrook*, 11 Met. 460; *Wood v. R. R. Co.*, 51 Wis. 196. In an action against a warehouseman for the loss of goods by fire, alleged to have been occasioned by his negligence, the burden of proof is on

the plaintiff to show such negligence: *Denton v. R. R. Co.*, 52 Iowa, 161; 35 Am. Rep. 263. The general character of the defendant as to carefulness in respect to fire is irrelevant: *Scott v. Hale*, 16 Me. 326.

² *Bryan v. Fowler*, 70 N. C. 596; *Catron v. Nichols*, 81 Mo. 80; 51 Am. Rep. 222. *Aliter* as to fires by railroads: See *post*.

³ *Gagg v. Vetter*, 41 Ind. 228; 13 Am. Rep. 322; *Hinds v. Barton*, 25 N. Y. 545; *Teall v. Barton*, 40 Barb. 137; *Hoyt v. Jeffers*, 30 Mich. 181; *Read v. Morse*, 34 Wis. 315; *Burbank v. Bethel*, 75 Me. 373; 46 Am. Rep. 400.

⁴ *Varney v. Thomson*, 13 Fac. Coll.

491. ⁵ *Harvey v. Derwoody*, 18 Ark. 252.

against the parties pulling it down, the court held that, by reason of the uses to which the building was devoted, and the danger from fire therefrom by other buildings in the vicinity, it was a nuisance, and any person interested was justified in destroying it, if necessary, to prevent the nuisance. But a mere increase of hazard to the surrounding property is not enough, if the danger is not extraordinary and imminent.¹ And it is held in Texas a question for the jury whether the use of the property in the particular case really increases the danger to the adjoining building to fire more than would result from the ordinary use of property for such purposes.² Keeping ashes in a wooden barrel, in violation of a municipal ordinance, is not negligent *per se*.³ But the fact is admissible on the question of negligence, as is also the fact that a stove-pipe which caused the fire was put up in violation of a municipal ordinance requiring it to enter some chimney, unless the fire superintendent permit otherwise.⁴ One is not necessarily guilty of contributory negligence in erecting buildings near a chimney on which is a defective spark-arrester.⁵

ILLUSTRATIONS. — M., having stacked his hay when too green, was warned by his neighbors that it would be liable to generate fire, and subsequently seeing it smoke, he said he would chance it. It afterwards burst into a flame, and spread to V.'s property, damaging it. *Held*, that M. was liable: *Vaughan v. Menlove*, 4 Scott, 244; 3 Bing. N. C. 464. While S. was thrashing in a field with a steam-machine a high wind sprung up, which made it dangerous to continue. S., however, kept on, and the fire was carried to an adjoining field, doing damage. *Held*, that S. was liable: *Collins v. Groseclose*, 40 Ind. 414. A

¹ *Duncan v. Hayes*, 22 N. J. Eq. 25. In this case, the plaintiff prayed to enjoin the defendant from erecting a steam planing and saw mill, because it exposed her buildings to fire, and largely increased the rates of insurance upon property in the vicinity. But the injunction was refused, the chancellor saying: "I know of no precedent for an injunction against any business on

account of an increased risk from fire to the adjoining premises."

² *League v. Jornenay*, 25 Tex. 172.

³ *Cook v. Johnson*, 58 Mich. 437; 55 Am. Rep. 703.

⁴ *Briggs v. R. R. Co.*, 72 N. Y. 26.

⁵ *Alpern v. Churchill*, 53 Mich. 607. And see *Stone v. Trans. Co.*, 38 N. Y. 240, as to contributory negligence.

person goes into a house with a lighted candle. The house is soon after discovered to be on fire. *Held*, that there is no presumption that it was set on fire by negligence: *Lansing v. Stone*, 37 Barb. 15. A stove was left with its damper wide open in a room which was locked, and which contained oil-cans, one of which was on the stove, and inflammable waste scattered around the stove. *Held*, evidence of negligence: *Read v. R. R. Co.*, 44 N. J. L. 280. A tenant maintained a fire in a leased barn, in a stove, the pipe passing through a hole in the roof, by means whereof the barn was destroyed by fire. *Held*, that a finding that the destruction was by the tenant's fault would not be set aside: *Dorr v. Harkness*, 49 N. J. L. 571; 60 Am. Rep. 656. The defendant's premises and the plaintiff's adjoined each other, being separated by an ordinary partition. The defendant erected in his house a cooking-range so near the partition-wall that the ordinary use of the range injured the goods in the plaintiff's store by reason of the heat arising therefrom, and rendered the plaintiff's premises uncomfortable. *Held*, that the use of the range by the defendant in that way was a nuisance, and that the landlord who erected the range was liable for the injuries resulting therefrom, even though the premises were in the possession of a tenant when the injury was done. *Grady v. Wolsner*, 46 Ala. 381; 7 Am. Rep. 593.

§ 1355. **In Clearing Land.** — A person may set fire to the grass, stubble, timber, or other material on his land for the purpose of clearing it, and he is not liable for any injurious consequences that may ensue to the property of his neighbors, unless he has also been guilty of some want of care or act of neglect.¹ No negligence is to be imputed.

¹ *Calkins v. Barger*, 44 Barb. 424; *Dewey v. Leonard*, 14 Minn. 153; *Miller v. Martin*, 16 Mo. 508; 57 Am. Dec. 242; *Fahn v. Reichart*, 8 Wis. 255; 76 Am. Dec. 237; *Dean v. McCarty*, 2 U. C. Q. B. 448; *Gillson v. R. R. Co.*, 33 U. C. Q. B. 129; *Fraser v. Tupper*, 29 Vt. 409; *Bachelder v. Heagan*, 18 Me. 32; *Clark v. Foot*, 8 Johns. 422; *Bennett v. Scutt*, 18 Barb. 347; *Stuart v. Hawley*, 22 Barb. 619; *De France v. Spencer*, 2 G. Greene, 462; 52 Am. Dec. 533; *Hewey v. Nourse*, 54 Me. 256, the court saying: "Every person has a right to kindle fire on his own land for the purposes of husbandry, if he does it at a proper time and in a suitable manner, and

uses reasonable care and diligence to prevent it spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant." A lessor of land to be worked on shares, the lessee

to him because he did not anticipate a whirlwind which arose suddenly and carried the fire beyond his control.¹ But if one is guilty of negligence in setting out fire, or in his attempted control of it, it is immaterial whether he was diligent or negligent in attempting to save the destroyed property by backfiring, if in any event such property would have been destroyed.²

ILLUSTRATIONS. — H. set out a fire for the purpose of clearing his land, the weather being warm and the land dry. It spread, however, to the plaintiff's land. *Held*, that H. was not liable: *Stuart v. Hawley*, 22 Barb. 619. B. started a fire on his farm, and left it apparently safe; an unlooked for change in the weather ensued; a strong wind sprang up, and carried the fire to the adjoining premises. *Held*, that B. was not liable: *Calkins v. Barger*, 44 Barb. 424. A kindled a fire on his land, and attempted to extinguish it on the same day, but the fire, continuing to burn smolderingly in the soil of a slough until two days later, broke out afresh, and ran upon B's land. *Held*, that if A was negligent in kindling the fire, he was not excused from liability to B because he could not have foreseen by ordinary care that the fire would start again: *Krippner v. Biebl*, 28 Minn. 139. H., on the morning of a very dry day, set fire to a heap of logs within five yards of his neighbor's fence, a dead pine-tree and much combustible matter being between the log-pile and the fence. The fire spread to his neighbor's property. *Held*, that H. was liable: *Garrett v. Freeman*, 5 Jones, 78. L., in an unusually dry summer season, set fire to logs on his fallow, adjoining the woodland of H.; the fallow and the woodland were both covered with combustible matter; the day before the fire was set, there had been a heavy shower, but it afterward became dry and hot, and a high wind carried the fire to the land of H. *Held*, that L. was liable: *Hays v. Miller*, 6 Hun, 322; 70 N. Y. 112. C., while driving a herd of sheep through the country, encamped near plaintiff's premises, and started a fire near his house and barn; there was a quantity of dry brush and other material scattered around; C. continued his journey without extinguishing the fire. *Held*, that C. was liable: *Cleland v. Thornton*, 43 Cal. 437. J., having given the plaintiff permission to cut wood on his land, started a fire very

to clear a portion at a specified price, is not liable to an adjoining owner for damages from fires kindled by the lessee in clearing: *Ferguson v. Hubbell*, 26 Hun, 250.

¹ *Sweeney v. Merrill*, 38 Kan. 216; 5 Am. St. Rep. 734.

² *Sweeney v. Merrill*, 38 Kan. 216; 5 Am. St. Rep. 734.

near one of his piles, which escaped from his control and consumed it. *Held*, that the plaintiff was responsible: *Jordan v. Wyatt*, 4 Gratt. 151; 47 Am. Dec. 720. H. intending to burn up the brush on his own land, set fire to it within six feet of the plaintiff's land, which was also covered with brush. The fire spread to the plaintiff's land. *Held*, that H. was liable: *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63.

§ 1356. **Statutory Liability.** — In some states by statute an absolute liability is created under some circumstances.¹ In North Carolina, written notice must first be given of the intention to start a fire on the land.² In Illinois, Kansas, and Missouri no woods, marshes, or prairies may be set on fire except in case of necessity.³

§ 1357. **Liability of Railroads for Causing Fires.** — In the absence of charter authority, it would seem that a person or corporation running a locomotive through city or county should be liable for all damage caused by the escape of fire therefrom.⁴ This was the view taken by the English court of exchequer, when, the question presenting itself for the first time, it was held by that tribunal that as accidents occasionally arise from the use of fire as a means of propelling engines on railroads, the happening of such accidents must be taken to be the natural and necessary consequence of the use of fire for such purpose, and that, therefore, railroad companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power.⁵ On appeal to the court of exchequer chamber, this ruling was, however, reversed, and the doc-

¹ Missouri: 1 Wagner's Stats. 638; Illinois: Rev. Stats. 1879, sec. 158; North Carolina: Rev. Code, c. 16, sec. 2; Iowa: Comm. v. May, 36 Iowa, 241; Connecticut: Ayer v. Starkey, 30 Conn. 304; Grannis v. Cummings, 25 Conn. 165.

² Lamb v. Sloan, 94 N. C. 534. But the adjoining owners may waive the notice: Roberson v. Kirby, 7 Jones, 477; Jordan v. Lassiter, 6 Jones, 130.

³ See Johnson v. Barber, 10 Ill. 425; 50 Am. Dec. 416; Burton v. McClellan, 3 Ill. 434; Hunt v. Haines, 25 Kan. 210.

⁴ Jones v. R. R. Co., L. R. 3 Q. B. 735; Hammersmith R. R. Co. v. Brand, L. R. 4 H. L. 171; Mosher v. R. R. Co., 8 Barb. 427.

⁵ Vaughan v. R. R. Co., 3 Hurl. & N. 742.

trine, now undisputed both in England and America, established, that when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every reasonable precaution is observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage result from the use of such thing, the party using it is not responsible.¹ Therefore, in the case of railroads authorized to propel their cars by steam, the gist of their liability for injuries caused by the escape of fire, it is now well settled, is negligence.² The railroad, to excuse itself from liability, must show that due and reasonable care proportionate to the danger was used to avoid the injury.³ Where a railroad company is required by law to permit other trains to run over its line, and it permits an engine not belonging to itself to run which is so negligently constructed as to be dangerous to adjoining property, the company will be liable for injuries occasioned by it.⁴ If fences are burned, the railroad company is liable for a loss to crops caused by animals

¹ *Vaughan v. R. R. Co.*, 5 Hurl. & N. 678.

² *R. v. Pease*, 4 Barn. & Adol. 30; *State v. Tupper*, Dudley, 135; *King v. R. R. Co.*, 18 N. J. Eq. 397; *Hammersmith R. R. Co. v. Brand*, L. R. 4 H. L. 171; *Aldridge v. R. R. Co.*, 3 Man. & G. 517; *Piggot v. R. R. Co.*, 3 Com. B. 229; *Illinois etc. R. R. Co. v. Mills*, 42 Ill. 407; *Railroad Co. v. Yeiser*, 8 Pa. St. 366; *Frankford etc. Turnpike Co. v. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708; *Philadelphia etc. R. R. Co. v. Yerger*, 73 Pa. St. 121; *Indiana etc. R. R. Co. v. Paramore*, 31 Ind. 143; *Huyett v. R. R. Co.*, 23 Pa. St. 373; *Jackson v. R. R. Co.*, 31 Iowa, 176; 7 Am. Rep. 120; *Kansas etc. R. R. Co. v. Butts*, 7 Kan. 308; *Ellis v. R. R. Co.*, 2 Ired. 140; *Pittsburg etc. R. R. Co. v. Culver*, 60 Ind. 469; *Morris etc. R. R. Co. v. State*, 36 N. J. L. 553; *McCready v. R. R. Co.*, 2 Strob. 356;

Burroughs v. R. R. Co., 15 Conn. 124; 38 Am. Dec. 64; *Miller v. R. R. Co.*, 9 Hun, 194; *Home Insurance Co. v. R. R. Co.*, 11 Hun, 182; *McHugh v. R. R. Co.*, 41 Wis. 78; *Woodson v. R. R. Co.*, 21 Minn. 60; *Leavenworth etc. R. R. Co. v. Cook*, 18 Kan. 261; *Slosson v. R. R. Co.*, 52 Iowa, 92; *Atchison etc. R. R. Co. v. Riggs*, 31 Kan. 622; *Missouri Pacific R. R. Co. v. R. R. Co.*, 31 Fed. Rep. 526; *Lowney v. R. R. Co.*, 78 Me. 479.

³ *Smith v. R. R. Co.*, 10 R. I. 22; *Fero v. R. R. Co.*, 22 N. Y. 209; *Webb v. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Michigan etc. R. R. Co. v. Anderson*, 20 Mich. 244; *Pierce v. R. R. Co.*, 105 Mass. 199; *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 387; *Frankford etc. Turnpike Co. v. R. R. Co.*, 54 Pa. St. 345; 93 Am. Dec. 708; *Kellogg v. R. R. Co.*, 94 U. S. 469.

⁴ *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. 299; 23 Am. Rep. 214.

getting at them, plaintiff having made reasonable efforts to prevent the loss.¹

§ 1358. Duty of Railroad — As to Construction of Engine. — In the construction of its engine or locomotive so as to prevent the escape of fire, the railroad company is required to provide itself with all the precautions which is within its means, and which science and invention have offered.² This must be restricted, however, to the most improved machinery which is practicable, and not anything which mechanical skill and ingenuity can devise, whether known or not, or able to be obtained or not. An instruction that the defendant was guilty of negligence, "unless provided with all the means and appliances which science has discovered to prevent the escape of fire," is erroneous.³ A private person or a railroad company is not bound to purchase a patent for every invention which is claimed to be an improvement. To be approved, such appliances must be shown, both by use and the experience of men, to be superior and effectual.⁴ But if a particular

¹ *Miller v. R. R. Co.*, 90 Mo. 389.

² In several cases expert testimony has been given to the effect that by the use of proper appliances the escape of sparks from a locomotive is impossible: *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Steinweg v. R. R. Co.*, 43 N. Y. 123; 3 Am. Rep. 673; *Case v. R. R. Co.*, 59 Barb. 644; *Dimmock v. R. R. Co.*, 4 Fost. & F. 1058; *Longabaugh v. R. R. Co.*, 9 Nev. 271; *Longman v. Canal Co.*, 3 Fost. & F. 736; *Crist v. R. R. Co.*, 1 Thomp. & C. 435. And in *Piggot v. R. R. Co.*, 3 Com. B. 228, Maule, J., said: "The evidence, I think, shows that it is perfectly practicable to adopt precautions that will render such accidents next to impossible, by traveling at a rate of speed or with a load proportioned to the power of the engine." "Experience has demonstrated," says Scott, J., in *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 389, "that railway companies, by the use of certain mechanical inventions and contrivances, can prevent the

emission of fire-sparks from locomotive-engines in such quantities, at least, as would not be at all dangerous to property in the immediate proximity." In *Small v. R. R. Co.*, 6 Cent. L. J. 310, Beck, J., says: "We are of opinion that contrivances may be applied to engines that would prove just as effectual in preventing the escape of fire as a fence is in preventing cattle going upon a railroad track. Whether such contrivances are in use we know not, and it is not important to inquire; that they may be applied cannot be doubted, when we contemplate the resources which science brings to the aid of machinists. At all events, the law, in holding railroad companies liable for damage resulting from fires set out by their engines, presumes they may prevent injuries in that way."

³ *Read v. Morse*, 34 Wis. 315.

⁴ *Spaulding v. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550; *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am.

safeguard has been tested, and found to meet the purpose, the railroad is required to adopt it.¹ And on the other hand, if the company has taken all practicable precautions that science and invention could suggest and the circumstances would permit, it is free from negligence in this respect, and is freed from liability.²

§ 1359. As to Keeping and Management of Engine.

—The railroad, to escape liability, must also show that at the time of the injury the locomotive was in good order, and being properly managed by competent persons.³ A railroad is required to use greater care in running its

Rep. 57; Frankford etc. Turnpike Co. v. R. R. Co., 54 Pa. St. 345; 93 Am. Dec. 708; Anderson v. Cape Fear S. Co., 64 N. C. 399; St. Louis etc. R. Co. v. Gilham, 39 Ill. 455; Longabaugh v. R. R. Co., 9 Nev. 271; Beaver v. R. R. Co., 13 Hun, 254; Hoyt v. Jeffers, 30 Mich. 181; Steinweg v. R. R. Co., 43 N. Y. 123; 3 Am. Rep. 673.

¹ Toledo etc. R. R. Co. v. Corn, 71 Ill. 493; Gagg v. Vetter, 41 Ind. 228; 13 Am. Rep. 322; Fremantle v. R. R. Co., 2 Fost. & F. 340; Lackawanna etc. R. R. Co. v. Doak, 52 Pa. St. 379; 91 Am. Dec. 166.

² Vaughan v. R. R. Co., 5 Hurl. & N. 679; Kansas etc. R. R. Co. v. Butts, 7 Kan. 308; Burke v. R. R. Co., 7 Heisk. 451; 19 Am. Rep. 618; Rood v. R. R. Co., 18 Barb. 80; Phila. etc. R. R. Co. v. Hendrickson, 80 Pa. St. 182; 21 Am. Rep. 97; Burlington etc. R. R. Co. v. Westover, 4 Neb. 268; Jefferies v. R. R. Co., 3 Houst. 447; Illinois etc. R. R. Co. v. McClelland, 42 Ill. 355; Frankford etc. Turnpike Co. v. R. R. Co., 54 Pa. St. 345; 93 Am. Dec. 708; Baltimore etc. R. R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72; Hoff v. R. R. Co., 45 N. J. L. 201. "If there was known and in use any apparatus which applied to an engine would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property, it was negligent if

it did not avail itself of such apparatus. But it was not bound to use every possible precaution which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction": Steinweg v. R. R. Co., 43 N. Y. 123; 3 Am. Rep. 673. "If the company, by availing itself of all the discoveries which science and experience have put within its reach, could have constructed its machinery so perfect as to prevent the emission of sparks or the dropping of coal, and if the machinery used in this case was not so perfect as to accomplish this purpose, the fact that the machinery used was such as was in common and general use, and had been approved by experience, did not relieve the appellant from liability": Pittsburgh etc. R. R. Co. v. Nelson, 51 Ind. 150.

³ Dimmock v. R. R. Co., 4 Fost. & F. 1058; Hinds v. Barton, 25 N. Y. 544; Toledo etc. R. R. Co. v. Wand, 48 Ind. 476; Baltimore etc. R. R. Co. v. Dorsey, 37 Md. 19; Chicago etc. R. R. Co. v. Quaintance, 58 Ill. 589; Chicago etc. R. R. Co. v. Clampit, 63 Ill. 95; Wilson v. R. R. Co., 16 S. C. 587. An engine became out of repair at a point on the line where there were no facilities for repairing. Held not to authorize defendant to run the engine with increased danger to the next repair-shop, but to necessitate stopping at the next station: Texas etc. R. R. Co. v. Tankersley, 63 Tex. 57.

trains through villages, where wooden buildings are so near its road as to be exposed to fire from locomotives, than in the open country.¹ Proof that its engines were properly constructed and equipped, and were carefully inspected by a competent person every other day, and found to be in good order, will rebut the presumption of negligence, even though the inspection is not shown to have continued down to the moment when the fire escaped.² But this must be proved by direct evidence, not by a usage to this effect.³ Overloading the locomotive is negligence.⁴ Negligence may be inferred from using wood in a coal-burning engine,⁵ or from carrying more steam than necessary, whereby an undue quantity of sparks are emitted. But a railroad company has a right to use the fuel in ordinary use; and it is not liable for using an inferior quality, unless its use was known to be hazardous.⁶ Running at a greater rate of speed than allowed by statute is negligence.⁷ Failing to use a spark-arrester is negligence *per se*.⁸

The following have been held not to amount to negligence on the evidence: Putting an undue amount of coal into the fire-box, and running backwards and forwards

¹ *Fero v. R. R. Co.*, 22 N. Y. 209; 78 Am. Dec. 178.

² *Baltimore etc. R. R. Co. v. Shipley*, 39 Md. 251.

³ *Baltimore etc. R. R. Co. v. Shipley*, 39 Md. 251. But see *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 389.

⁴ *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57.

⁵ *St. Joseph etc. R. R. Co. v. Chase*, 11 Kan. 47; *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 389.

⁶ *Collins v. R. R. Co.*, 5 Hun, 499.

⁷ *Martin v. R. R. Co.*, 23 Wis. 437; 99 Am. Dec. 189.

⁸ *Anderson v. Steamboat Co.*, 64 N. C. 399; *Bedell v. R. R. Co.*, 44 N. Y. 367; 4 Am. Rep. 688; *Piggot v. R. R. Co.*, 3 Com. B. 229; *Brighthope R. R. Co. v. Rogers*, 76 Va. 443;

Searles v. R. R. Co., 49 N. Y. Sup. Ct. 425. In some cases this has been held a question of fact for the jury: *Fremantle v. R. R. Co.*, 10 Com. B., N. S., 89; *Kellogg v. R. R. Co.*, 94 U. S. 470; 1 Cent. L. J. 278; *Lackawanna etc. R. R. Co. v. Doak*, 52 Pa. St. 379; 91 Am. Dec. 166; *Algier v. The Maria*, 14 Cal. 167; *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Gerke v. Navigation Co.*, 9 Cal. 251; 70 Am. Dec. 650; *Crandall v. Goodrich Trans. Co.*, 16 Fed. Rep. 75. A municipal ordinance forbidding the running of any steamboat without a spark-arrester to prevent the escape of sparks "as effectually as the same can be prevented by any means known or in use" is unreasonable: *Atkinson v. Trans. Co.*, 60 Wis. 141; 50 Am. Rep. 352.

while at a water-station;¹ shutting off steam,² and emitting steam through the smoke-stack.³

And the defendant may become liable for failing to extinguish the fire. In a Missouri case, where a fire, started from a locomotive on the defendant's right of way, was seen by employees of the company in time to have extinguished it before it had gone very far, and they, notwithstanding this, permitted it to burn, whereby it spread to and consumed the plaintiff's premises, the company was held liable, although the escape of the fire from the locomotive was accidental and without negligence.⁴ So where sparks from a construction train set fire to combustibles on the track, which, spreading, burned the plaintiff's property, and the defendant's servants on the train, though having notice of the fire, did not stop and attempt to extinguish it, the defendant was held responsible. Had the train been a passenger train, it was said the duty might not have been the same.⁵ So the company is liable for an injury caused by a burning brand being thrown from a passing locomotive.⁶

§ 1360. **As to Track and Right of Way.**—The railroad is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives; and neglect in this respect will make it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape.⁷ A railroad company is not bound to keep a patrol

¹ Philadelphia etc. R. R. Co. v. Yerger, 73 Pa. St. 121.

² Burke v. R. R. Co., 7 Heisk. 451; 19 Am. Rep. 618.

³ Kellogg v. R. R. Co., 1 Cent. L. J. 279.

⁴ Kenney v. R. R. Co., 63 Mo. 99; Bass v. R. R. Co., 28 Ill. 9; 81 Am. Dec. 254, — a similar case.

⁵ Roelke v. R. R. Co., 26 Wis. 537.

⁶ McCoun v. R. R. Co., 66 Barb. 338; Mobile etc. R. R. Co. v. Gray, 62 Miss. 383.

⁷ Troxler v. R. R. Co., 74 N. C. 377; Flynn v. R. R. Co., 40 Cal. 14; 6 Am. Rep. 595; Salmon v. R. R. Co., 38 N. J. L. 5; 20 Am. Rep. 356; Delaware etc. R. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. Rep. 214; Kellogg v. R. R. Co., 26 Wis. 223; 7 Am. Rep. 69; Toledo etc. R. R. Co. v. Wand, 48 Ind. 476; Burlington etc. R. R. Co. v. Westover, 4 Neb. 268; Henry v. R. R. Co., 50 Cal. 176; Pittsburg etc. R. R. Co. v. Nelson, 51 Ind. 150; Richmond etc. R. R. Co. v. Medley, 75 Va. 499; 40 Am.

on the track to guard against or extinguish fires.¹ But it is competent evidence, bearing on the question of negligence, that after the fire more men were employed by the company to walk and watch the track than were employed when the damage occurred.² A railroad company has the right to keep at its stations such supplies of wood as are, in its judgment, necessary for its present or future use, and it is not liable for any injury caused by the accidental burning thereof, unless it results from the carelessness of the company or its agents and servants.³

ILLUSTRATIONS.—Workmen, employed by the company in cutting the grass and trimming the hedges bordering its line, placed the trimmings in heaps near the track, where they remained for fourteen days in the month of August. One of the heaps was ignited by a passing engine, and the fire spread to a house two hundred yards distant from the track. *Held*, that there was evidence to go to the jury of negligence on the part of the company, although there was no suggestion that the engine was improperly constructed or driven: *Smith v. R. R. Co.*, L. R. 5 Com. P. 98; L. R. 6 Com. P. 14. Plaintiff left cotton upon a platform near the track of defendant railroad company, intending to have it shipped. Before delivery to the company the cotton was burned by a fire which caught from a spark from the engine. The company did not own the platform, though it constantly used it, and paid for other cotton there burned at the same time, the cotton paid for having been received by the company for carriage. *Held*, that the imputation of negligence resulting from the fact that a spark from

Rep. 734; *Brighthope R. R. Co. v. Rogers*, 76 Va. 443; *Aycock v. R. R. Co.*, 89 N. C. 321; *Ind. etc. R. R. Co. v. Overman*, 110 Ind. 538; *Clarke v. R. R. Co.*, 33 Minn. 319; *Louisville etc. R. R. Co. v. Stevens*, 87 Ind. 198. Whether or not a railroad company is guilty of negligence in permitting combustible materials to accumulate upon its lands is a question for the jury: *Kesee v. R. R. Co.*, 30 Iowa, 78; 6 Am. Rep. 643; *Kellogg v. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69; *Webb v. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Bass v. R. R. Co.*, 28 Ill. 9; 81 Am. Dec. 254; *Illinois etc. R. R. Co. v. Mills*, 42 Ill. 407; *Ohio etc. R. R. Co. v. Shanefelt*, 47 Ill. 497; 95 Am.

Dec. 504; *Illinois etc. R. R. v. Frazier*, 47 Ill. 505; *Rockford etc. R. R. Co. v. Rogers*, 62 Ill. 346; *Texas etc. R. R. Co. v. Medaris*, 64 Tex. 92. In an action for damages by fire, alleged to have been caused by the negligent management of the defendant's locomotive, evidence of negligence in allowing combustible material to accumulate on the right of way is inadmissible: *Carter v. R. R. Co.*, 65 Iowa, 287.

¹ *Baltimore etc. R. R. Co. v. Shipley*, 39 Md. 251; *Ind. etc. R. R. Co. v. Paramore*, 31 Ind. 143.

² *Westfall v. R. R. Co.*, 5 Hun, 75.

³ *Macon etc. R. R. Co. v. McConnell*, 31 Ga. 133; 76 Am. Dec. 685.

the engine fired the cotton was rebutted by proof that the engine was carefully and skillfully managed, and was provided with improved spark-arresters, and that the company was under no obligation to provide a watchman for the cotton: *Brown v. R. R. Co.*, 19 S. C. 39. A railroad company switched burning cars on a side-track to save the rest of the train, and negligently allowed them to run to the end of the side-track, and so destroyed plaintiff's property, when, by stopping them in the middle of the siding, no property would have been injured. *Held*, that the company was liable for the injury done: *St. Louis etc. R. R. Co. v. Hecht*, 38 Ark. 357.

§ 1361. **Evidence of Negligence.**—In a number of states the destruction of property by fire from the defendant's locomotive raises a presumption of negligence which casts the burden on the defendant that it was not negligent, but used safe appliances and competent servants.¹ But in other states some additional evidence of negligence is required of the plaintiff.² The plaintiff is not bound

¹ *Illinois*.—*Bass v. R. R. Co.*, 28 Ill. 9; 81 Am. Dec. 254; *Illinois etc. R. R. Co. v. Mills*; 42 Ill. 407; *Toledo etc. R. R. Co. v. Lannon*, 67 Ill. 68; subsequently adopted by statute: Rev. Stats. 1877, c. 114, sec. 89.

Missouri.—*Fitch v. R. R. Co.*, 45 Mo. 325; *Bedford v. R. R. Co.*, 46 Mo. 456; *Clemens v. R. R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Coale v. R. R. Co.*, 60 Mo. 227; *Coates v. R. R. Co.*, 61 Mo. 38; *Wise v. R. R. Co.*, 85 Mo. 178; *Crews v. R. R. Co.*, 19 Mo. App. 302; *Miller v. R. R. Co.*, 90 Mo. 389; *Huff v. R. R. Co.*, 17 Mo. App. 356.

Nebraska.—*Burlington etc. R. R. Co. v. Westover*, 4 Neb. 268.

Nevada.—*Longabaugh v. R. R. Co.*, 9 Nev. 271.

North Carolina.—*Lawton v. Giles*, 90 N. C. 374.

Minnesota.—*Woodson v. R. R. Co.*, 21 Minn. 60; *Johnson v. R. R. Co.*, 31 Minn. 57; *Mahoney v. R. R. Co.*, 35 Minn. 361.

Michigan.—*Jones v. R. R. Co.*, 59 Mich. 437.

Tennessee.—*Burke v. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618; *Simpson v. R. R. Co.*, 5 Lea, 456.

Texas.—*Int. etc. R. R. Co. v. Timmermann*, 61 Tex. 660.

Wisconsin.—*Spaulding v. R. R. Co.*, 30 Wis. 110; 11 Am. Rep. 550. And in England: See *Aldridge v. R. R. Co.*, 3 Man. & G. 515; *Smith v. R. R. Co.*, L. R. 6 Com. P. 14; *Gibson v. R. R. Co.*, 1 Fost. & F. 23.

² *Connecticut*.—*Burroughs v. R. R. Co.*, 15 Conn. 124; 38 Am. Dec. 64.

Indiana.—*Indiana etc. R. R. Co. v. Paramore*, 31 Ind. 143; *Pittsburgh etc. R. R. Co. v. Hixon*, 110 Ind. 225.

New York.—*Sheldon v. R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155; *McCaig v. R. R. Co.*, 8 Hun, 599; *Rood v. R. R. Co.*, 18 Barb. 80; *Collins v. R. R. Co.*, 5 Hun, 503. But see *Case v. R. R. Co.*, 59 Barb. 644.

Kansas.—*Kansas etc. R. R. Co. v. Butts*, 7 Kan. 308; *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362.

Pennsylvania.—*R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Huyett v. R. R. Co.*, 23 Pa. St. 373; *Jennings v. R. R. Co.*, 93 Pa. St. 337; *Albert v. R. R. Co.*, 98 Pa. St. 316. But see *Lackawanna etc. R. R. Co. v. Doak*, 52 Pa. St. 379; 91 Am. Dec. 166; *Penn. Co. v. Watson*, 81½ Pa. St. 293.

California.—*Hull v. R. R. Co.*, 14 Cal. 387; 73 Am. Dec. 656; *Henry v. R. R. Co.*, 50 Cal. 176.

to prove which particular locomotive caused the fire.¹ That a fire started after the train passed is evidence that it was set by the train.² To prove negligence, the plaintiff may show that the locomotive in question on the day of the injury emitted sparks, while others on the same road did not;³ that the locomotive at the time of the injury emitted a quantity of sparks so large and so brilliant as to attract the attention of the witness;⁴ that the locomotives on the same line frequently emitted sparks;⁵ that after the injury the defendant changed the stack on the locomotive;⁶ that the locomotive was running faster than the statutory rate.⁷

ILLUSTRATIONS. — The fire started in the grass near and to the leeward of defendant's track a few minutes after a train had passed; it was shown that there was quite a stiff breeze, and that there was no person, and no other fire than that of the passing engine, in the vicinity at the time. *Held*, to justify a finding of the jury, that it was fired by the engine: *Karsen v. R. R. Co.*, 29 Minn. 12.

§ 1362. **Evidence of Other and Distinct Fires.**—In actions of this character, it is held in a number of cases that the plaintiff may introduce evidence of other and distinct fires set out by the defendant's locomotive, either before or after the happening of the injury sued for, and without showing that they were in the charge of the same

North Carolina. — *Ellis v. R. R. Co.*, 2 Ired. 138.

Delaware. — *Jefferis v. R. R. Co.*, 3 *Houst.* 447.

Iowa. — *Gandy v. R. R. Co.*, 30 *Iowa*, 420; 6 *Am. Rep.* 682; *McCummons v. R. R. Co.*, 33 *Iowa*, 187; *Garrett v. R. R. Co.*, 36 *Iowa*, 121. But this rule has since been altered by statute: *Babcock v. R. R. Co.*, 62 *Iowa*, 593.

Ohio. — *Ruffner v. R. R. Co.*, 34 *Ohio St.* 96.

¹ *Bevier v. R. R. Co.*, 13 *Hun.* 254; *Atchison etc. R. R. Co. v. Stanford*, 12 *Kan.* 354; 15 *Am. Rep.* 362.

² *Redmond v. R. R. Co.*, 76 *Mo.* 550; *Kenney v. R. R. Co.*, 70 *Mo.* 243;

Wiley v. R. R. Co., 44 *N. J. L.* 247. But see *Musselwhite v. R. R. Co.*, 4 *Hughes*, 166.

³ *Atchison etc. R. R. Co. v. Bales*, 16 *Kan.* 252; *Atchison etc. R. R. Co. v. Campbell*, 16 *Kan.* 201.

⁴ *Ruppel v. R. R. Co.*, 13 *Daly*, 11; *Ashley v. R. R. Co.*, 13 *Daly*, 205; *Brusberg v. R. R. Co.*, 55 *Wis.* 106.

⁵ *Penn. R. R. Co. v. Stranahan*, 79 *Pa. St.* 405.

⁶ *St. Joseph etc. R. R. Co. v. Chase*, 11 *Kan.* 47; *Bevier v. R. R. Co.*, 13 *Hun.* 254; *Alpern v. Churchill*, 53 *Mich.* 607.

⁷ *Martin v. R. R. Co.*, 22 *Wis.* 437; 99 *Am. Dec.* 189.

engineer, or were the same kind of engines as the one which caused the damage.¹ Such evidence, it is said, is relevant, both to show the cause of the injury² and negligence in the construction or management of the particular engine which caused the damage.³ Evidence that

¹ *Henry v. R. R. Co.*, 56 Cal. 176; *Gagg v. Vetter*, 41 Ind. 228; 13 Am. Rep. 322; *Hinds v. Barton*, 25 N. Y. 544; *Hoyt v. Jeffers*, 30 Mich. 181; *Home Ins. Co. v. R. R. Co.*, 11 Hun, 182; *Sheldon v. R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155; *Butcher v. R. R. Co.*, 67 Cal. 518; *Diamond v. R. R. Co.*, 6 Mont. 580. Evidence that the same locomotive on the same trip set other fires is evidence of improper construction, repair, or use: *Lanning v. R. R. Co.*, 68 Iowa, 502; *Slossen v. R. R. Co.*, 60 Iowa, 215; *Loring v. R. R. Co.*, 131 Mass. 469.

² *Piggot v. R. R. Co.*, 3 Com. B. 230; *Burke v. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618; *Field v. R. R. Co.*, 32 N. Y. 339; *Longabaugh v. R. R. Co.*, 9 Nev. 271; *Ross v. R. R. Co.*, 6 Allen, 87, the court saying: "The evidence to which the defendant objected was clearly competent. One of the grounds of the defense was, that no sparks of coal from the engine of the defendant could reach the premises of the plaintiff so as to communicate fire. To meet this proposition it was certainly fit and apposite for the plaintiff to prove the physical possibility that fire could be so communicated, by showing that, on a previous occasion, the same engine, using the same species of fuel, had emitted burning sparks which fell within the inclosure of the plaintiff. Such evidence would have been open to question if offered solely in support of the plaintiff's case; but it was rendered relevant and material by the ground taken in defense. On the same ground, evidence concerning the emission of sparks from similar engines used on other roads was admissible." Hence, if the origin of the fire be admitted, or if the possibility of its being caused by the defendant be not denied, evidence of subsequent fires would be inadmissible, for this purpose at least: *Smith v. R. R. Co.*, 10 R. I. 22.

³ *Smith v. R. R. Co.*, 10 R. I. 22; *Field v. R. R. Co.*, 32 N. Y. 339; *Chase v. R. R. Co.*, 11 Kan. 47; *Huyett v. R. R. Co.*, 23 Pa. St. 373; *R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454; *Cleaveland v. R. R. Co.*, 42 Vt. 449; *Annapolis etc. R. R. Co. v. Garret*, 39 Md. 115; *Boyce v. R. R. Co.*, 43 N. H. 627; *Webb v. R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389. *Contra*, *Erie R. R. Co. v. Decker*, 78 Pa. St. 293; *Coale v. R. R. Co.*, 60 Mo. 227; *Lester v. R. R. Co.*, 60 Mo. 641. "What are the facts of this case? Plaintiff's wood caught fire in some manner to him, at the time, unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York case, the improbabilities of the fire having originated in any other way except from coals dropping from the defendant's engines. He then shows the presence in the wood-yard of one of the engines of the defendant within half an hour prior to the breaking out of the fire; then proves that fires have been set in the same wood-yard, within a few weeks prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities. . . . Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendant, properly constructed, and supplied with the best appliances in general use, they could not have been properly managed, else the fire would not have occurred": *Longabaugh v. R. R. Co.*, 9 Nev. 271.

other engines, under like circumstances, did not communicate fire at the place where the fire in question occurred is competent as tending to prove negligence on the part of the defendant with regard to the engine which caused the fire, either as to its condition or management.¹

§ 1363. **Contributory Negligence.** — In England, it would seem from the decisions that the proprietor of adjoining property cannot be guilty of contributory negligence such as will prevent a recovery, from the fact that he in some measure invited the danger by leaving his property either in an exposed place or surrounded by inflammable matter.² In the leading English case on this subject, *Martin, B.*, said: "It would require a strong authority to convince me that because a railroad runs along my land I am bound to keep it in a particular state"; and *Bramwell, B.*, added: "The plaintiff used his land in a natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it a mischief."³ In some cases in this country the English rule is not followed, and the defense of contributory negligence has prevailed;⁴ but the decisions are difficult to reconcile. In other states the English rule is approved.⁵

¹ *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 354; 15 Am. Rep. 362; *Cleveland v. R. R. Co.*, 42 Vt. 449.

² *Hamman v. R. R. Co.*, Wolf on Railways, 239 note *c*; *Bliss v. R. R. Co.*, 2 Fost. & F. 341.

³ *Vaughan v. R. R. Co.*, 3 Hurl. & N. 742; 5 Hurl. & N. 678. And see *Salmon v. R. R. Co.*, 38 N. J. L. 5; 20 Am. Rep. 356; *Del. etc. R. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214.

⁴ *Kesee v. R. R. Co.*, 30 Iowa, 78; 6 Am. Rep. 643; *Murphy v. R. R. Co.*, 45 Wis. 222; 30 Am. Rep. 721; *Chicago etc. R. R. Co. v. Simonson*, 54 Ill. 504; 5 Am. Rep. 155.

⁵ *Phila. etc. R. R. Co. v. Schultz*, 93 Pa. St. 341; *Pitts. etc. R. R. Co. v.*

Hixon, 79 Ind. 111; *Salmon v. R. R. Co.*, 38 N. J. L. 5; 20 Am. Rep. 356; *Railroad Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; *Fitch v. R. R. Co.*, 45 Mo. 322; *Snyder v. R. R. Co.*, 11 W. Va. 15; *Ross v. R. R. Co.*, 6 Allen, 87; *Phila. etc. R. R. Co. v. Hendrickson*, 80 Pa. St. 182; 21 Am. Rep. 97; *Fero v. R. R. Co.*, 22 N. Y. 209; 78 Am. Dec. 178; *Bevier v. R. R. Co.*, 13 Hun, 254; *Kellogg v. R. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69; *Rowell v. R. R. Co.*, 57 N. H. 132; 24 Am. Rep. 59; *Pitts. etc. R. R. Co. v. Jones*, 86 Ind. 496; 44 Am. Rep. 334; *Richmond etc. R. R. Co. v. Medley*, 75 Va. 499; 40 Am. Rep. 734; *Lindsay v. R. R. Co.*, 29 Minn. 411; 43 Am. Rep. 228; *King v. Trans. Co.*,

In Illinois, where the doctrine of comparative negligence prevails, it is held that if the plaintiff has been guilty of any negligence in not keeping his field or other property free from combustible matter, he cannot recover, unless his negligence has been slight, and that of the company gross in comparison therewith; and this

1 Flip. 1; *Cook v. Champlain Trans. Co.*, 1 Denio, 91, the court saying: "The property destroyed was in an exposed and hazardous position, and therefore in more than ordinary danger from mere accidental fires. This risk the plaintiffs assumed, but not the risk of another's negligence. They were on their own land, and free to use it in any manner and for any purpose which was lawful. As was correctly observed by the circuit judge, the plaintiffs had as good a right to erect their mill on the shore of the lake as the defendants had to sail on its bosom. It must be a startling principle, indeed, that a building placed in an exposed position on one's own land is beyond the protection of the law, and yet it comes to this result upon the argument urged in this case. A land-owner builds immediately on the line of a railroad, as he has an unquestionable right to do; it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railroad? There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle, and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises. If the principle urged on the argument is correct, it must be applied in all cases of the same character. The owner of a lot builds upon it, although in close proximity to the shop of a smith. The house is more exposed than it would be at a greater distance from the shop; but is this to exempt the smith from the obligation of care, and to screen him from the consequences of his own negligence? I certainly think not. A horse or car-

riage on the open ground of the owner may be more exposed to injury than they would be in a yard or a barn; but if damaged by the carelessness of a passer-by, is the owner remediless because he chose to leave them in a place of comparative exposure and hazard? No one, I think, can doubt what the answer to this question should be. I refer to no authorities on this branch of the case, for, in my opinion, none are requisite. It is but clearly to comprehend the principle on which this species of defense must rest, to see that it has no application to such a case as this. By what criterion are we to determine the hazards of a particular position, and on that ground say that the owner by his own folly has deprived himself of all protection? In this respect everything is comparative; but where is the true standard to be found? A house forty feet from a steamboat-landing is in more hazard than one at the distance of forty rods, but it is less exposed than one immediately on the wharf. Goods at the window of a shop are less safe than they would be on a shelf at the rear of the room; but is the owner remediless if they are carelessly soiled or broken by some one in the street? We may run through every imaginary variety of position, some of more and some of less exposure and hazard, and we must at last come to the conclusion that while a person confines himself to a lawful employment on his own premises, his position, however injudicious and imprudent it may be, is not therefore wrongful; and that his want of due care or judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for wrong done to him by others": *Erd v. R. R. Co.*, 41 Wis. 65.

question is to be left to the jury to decide.¹ It has been held not contributory negligence to leave open the doors of an unfinished building situated near the track, although upon the floor were considerable shavings;² nor to suffer the roof of a building to be in such a condition as to be more liable to take fire than if it had a safe and secure roof;³ nor neglecting to keep down grass;⁴ nor permitting grass to accumulate in the fence-corners near the track;⁵ nor allowing leaves and combustible matter to accumulate on the land;⁶ nor building a house within thirty yards of the railroad track;⁷ nor to stack hay on a newly mown meadow thirty rods from the track;⁸ nor failing to plow a trench around a hedge and straw-ricks;⁹ nor failing to remove a barn which stands in dangerous proximity to the track;¹⁰ nor suffering the roof of a barn which stood near the track, and which was made of shingles, to become and remain dry and decayed, and peculiarly liable, on a dry and windy day, to be set on fire by a spark from a passing engine;¹¹ nor leaving a pane of glass out of a window in a building near the track.¹² But in other cases the following have been held to constitute contributory negligence on the part of the plaintiff: For

¹ *Illinois etc. R. R. Co. v. Mills*, 42 Ill. 407; *Illinois etc. R. R. Co. v. Frazier*, 47 Ill. 505; *Illinois etc. R. R. Co. v. Nunn*, 51 Ill. 78; *Chicago etc. R. R. Co. v. Simonson*, 54 Ill. 504; 5 Am. Rep. 155; *Ohio etc. R. R. Co. v. Shanefelt*, 47 Ill. 497; 95 Am. Dec. 504; *Great Western R. R. Co. v. Hawthorth*, 39 Ill. 347; *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Bass v. R. R. Co.*, 28 Ill. 9; 81 Am. Dec. 254.

² *Fero v. R. R. Co.*, 22 N. Y. 209; 78 Am. Dec. 178.

³ *Philadelphia etc. R. R. Co. v. Hendrickson*, 80 Pa. St. 182; 21 Am. Rep. 97.

⁴ *Smith v. R. R. Co.*, 37 Mo. 287; *Sibilrund v. R. R. Co.*, 29 Minn. 58.

⁵ *Fitch v. R. R. Co.*, 45 Mo. 322.

⁶ *Salmon v. R. R. Co.*, 38 N. J. L. 5; 20 Am. Rep. 356; *Delaware etc.*

R. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. Rep. 214; *Patton v. R. R. Co.*, 87 Mo. 117; 56 Am. Rep. 447; *Palmer v. R. R. Co.*, 76 Mo. 217; *Indiana etc. R. R. Co. v. Craig*, 14 Ill. App. 407.

⁷ *Burke v. R. R. Co.*, 7 Heisk. 451; 19 Am. Rep. 618.

⁸ *St. Joseph etc. R. R. Co. v. Chase*, 11 Kan. 47.

⁹ *Burlington etc. R. R. Co. v. Westover*, 4 Neb. 268; *Karsen v. R. R. Co.*, 29 Minn. 12. See *Lewis v. R. R. Co.*, 57 Iowa, 127; *Ormond v. R. R. Co.*, 58 Iowa, 742.

¹⁰ *Caswell v. R. R. Co.*, 42 Wis. 193; *Jefferis v. R. R. Co.*, 3 Houst. 447.

¹¹ *Jefferis v. R. R. Co.*, 3 Houst. 447.

¹² *Martin v. R. R. Co.*, 23 Wis. 437; 99 Am. Dec. 189; *Louisville etc. R. R. Co. v. Richardson*, 66 Ind. 43; 32 Am. Rep. 94.

the owner of a warehouse adjoining a railroad track to permit the windows of a room to remain open and unglazed, in which were stored cobs, husks of corn, grain, rags, and other inflammable material;¹ to allow shavings to accumulate around an unfinished house situated about one hundred feet from the track;² to pile wood near a side-track;³ or after the discovery of the fire by the plaintiff, to neglect to use reasonably practicable means to suppress it.⁴ The fact that the land to which the fire is communicated is wood-land is relevant on the question of the plaintiff's negligence. The greater difficulty of keeping such land clear of inflammable matter will abate the degree of diligence required of the land-owner.⁵ Where a land-owner has claimed and obtained damages for the occupation by the company of a certain strip of his land, the fact that he has run his fence outside that strip is also relevant.⁶ One who authorizes the use of a locomotive-engine on his premises for convenience in loading and unloading cannot maintain an action to recover damages caused by sparks from such engine.⁷ Where the defendant's negligence caused a fire on the plaintiff's land, although the plaintiff's negligence increased the loss, the plaintiff may still recover for the damage done before his own negligence began to operate.⁸ In an action to recover the value of an elevator alleged to have been burned by fire communicated to it from the building of another, which was set on fire by sparks from a locomotive on defendant's railroad, it was held that the contributory negligence of the owner of the building first burned would not constitute a defense.⁹

¹ *Great Western R. R. Co. v. Harworth*, 39 Ill. 347.

² *Coates v. R. R. Co.*, 61 Mo. 38.

³ *Post v. R. R. Co.*, 108 Pa. St. 585.
See *Pittsburg etc. R. R. Co. v. Noel*, 77 Ind. 110.

⁴ *Hogle v. R. R. Co.*, 28 Hun, 363.

⁵ *Chicago etc. R. R. Co. v. Simonson*, 54 Ill. 505; 5 Am. Rep. 155.

⁶ *R. R. Co. v. Yeiser*, 8 Pa. St. 366.

⁷ *Spear v. R. R. Co.*, 49 Mich. 246.

⁸ *Stebbins v. R. R. Co.*, 54 Vt. 464; 41 Am. Rep. 855.

⁹ *Small v. R. R. Co.*, 55 Iowa, 532.
See *Reiper v. Nichols*, 31 Hun, 491.

ILLUSTRATIONS. — The plaintiff's barn, in which he kept his horses, stood within two feet of the railroad fence. Straw and manure had been thrown outside, and had accumulated in a pile, and become dry and combustible. A spark from a passing engine set it on fire. *Held*, that this was evidence of contributory negligence to go to a jury: *Collins v. R. R. Co.*, 5 Hun, 499. Fire was communicated by sparks from the defendant's engine to a pile of wood in its yard, and from there was carried to the plaintiff's premises, adjacent thereto. *Held*, that the latter, in building his house so near the wood-yard, had assumed the increased risk: *Macon etc. R. R. Co. v. McConnell*, 27 Ga. 481. The plaintiff had placed his house some distance from the railroad track, but subsequently, through the erection by another of a building more contiguous to the track, it was placed in a much more hazardous position, and was, a short time afterwards, destroyed by fire communicated in the first instance to the later and nearer building, and from thence to the plaintiff's property. *Held*, that the plaintiff was not guilty of contributory negligence: *Toledo etc. R. R. Co. v. Maxfield*, 72 Ill. 95. Plaintiffs owned a warehouse, with a branch track connecting with defendants' railroad, and employed the defendants to draw cars upon that track for their accommodation. The engine thus used emitted sparks; the plaintiffs complained of this to the defendants; the defendants promised to repair it, but neglected to do so, and the plaintiffs continued to employ the engine. The warehouse being set on fire by sparks from this engine, *held*, that the plaintiffs were negligent, and had no remedy therefor against defendants: *Marquette etc. R. R. Co. v. Spear*, 44 Mich. 169; 38 Am. Rep. 242. Plaintiff carried on a varnish factory adjoining defendant's railroad, and in the manufacture exposed benzine out of doors on his premises, which was ignited by sparks from defendant's engine, and caused the destruction of the factory. *Held*, that plaintiff was not negligent: *Kalbfleishe v. R. R. Co.*, 102 N. Y. 520; 55 Am. Rep. 832. A building belonging to a railroad took fire from sparks from one of their engines, and from this building fire was blown across the street to the storehouse of P., which, with several thousand dollars in money contained therein, was consumed. In an action by P., *held*, 1. That as the loss of the money could have been prevented by reasonable efforts for its preservation, the company were not responsible as to it; 2. That the question whether the injury sustained was too remote was for the jury: *Toledo etc. R. R. Co. v. Pindar*, 53 Ill. 447; 5 Am. Rep. 57.

§ 1364. **Statutory Liability.**—In several states the causing of fire by railroads to adjoining property is

made *prima facie* evidence of negligence.¹ In Maine² and Massachusetts,³ when injury is done to any building or other property of any person by fire "communicated"⁴ by a locomotive-engine of any railroad company, the latter shall be held responsible in damages to the person or corporation so injured. A railroad company is also given an insurable interest in the property for which it may be held responsible in damages "along its route," and may procure insurance upon it in its own behalf. New Hampshire has a statute in all respects similar to these, except that the word "from" is used in the place of "communicated by," and the words "on the line of such road" in the place of the phrase "along its route"; consequently, in those states, the liability of a railroad is not dependent on its want of care. These statutes apply to corporations which have obtained their charters before their enactment,⁵ and a railroad company which has leased its line to another company remains responsible for any damage by the latter caused by fire,⁶

¹ *Vermont*. — Gen. Stats., c. 28, secs. 78, 79; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454; 3 Cent. L. J. 353; *Cleaveland v. R. R. Co.*, 42 Vt. 449.

Maryland. — Code, art. 77, sec. 2; *Baltimore etc. R. R. Co. v. Woodruff*, 4 Md. 242; 59 Am. Dec. 72; *Baltimore etc. R. R. Co. v. Shipley*, 39 Md. 252; *Baltimore etc. R. R. Co. v. Dorsey*, 37 Md. 19.

New Jersey. — Rev. Stats., c. 697, secs. 13, 14; *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214.

Kansas. — Gen. Stats. 1122, c. 118, sec. 2; *Missouri etc. R. R. Co. v. Davidson*, 14 Kan. 349.

Iowa. — Code, sec. 1289; *Rodemacher v. R. R. Co.*, 41 Iowa, 297; 20 Am. Rep. 592. In *Small v. R. R. Co.*, 6 Cent. L. J. 310, it was held by a divided court that the liability of railroad companies for damages caused by fire from their engines was by this section of the code made absolute. But on a rehearing this decision was overruled: See 50 Iowa, 338.

Illinois. — Rev. Stats. 1877, p. 775,

sec. 89. And see *Chicago etc. R. R. Co. v. McCahill*, 56 Ill. 28; *Pittsburgh etc. R. R. Co. v. Campbell*, 86 Ill. 445; *Ind. etc. R. R. Co. v. Nicewander*, 21 Ill. App. 305. Under the South Carolina statute making railroads liable for property burned near the right of way when the fire originates from acts of an agent, questions of negligence and proximate cause are irrelevant: *Thompson v. R. R. Co.*, 24 S. C. 366.

² Stats. 1842, c. 9, sec. 5.

³ Gen. Stats. 1860, c. 63, sec. 101; *Perley v. R. R. Co.*, 98 Mass. 414; 96 Am. Dec. 645; *Ingersoll v. R. R. Co.*, 8 Allen, 438.

⁴ For a construction of this word, see *Hart v. R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719; *Safford v. R. R. Co.*, 103 Mass. 583.

⁵ *Pratt v. R. R. Co.*, 42 Me. 578; *Ingersoll v. R. R. Co.*, 8 Allen, 438; *Lyman v. R. R. Co.*, 4 Cush. 238.

⁶ *Ingersoll v. R. R. Co.*, 8 Allen, 438. A railroad company may be held liable, independent of statute, for injuries caused by fire thrown from the loco-

as also does the lessee.¹ Under these statutes the defense of contributory negligence is not available.² These statutes embrace both real and personal property, provided it be permanently existing and capable of being insured. Growing timber³ and mechanics' tools and fences⁴ are within them. But not cedar posts that were deposited temporarily near the track, and which were intended to be used elsewhere.⁵ Property is "along the route" of the road when it is so near as to be exposed to the danger of fire; the actual distance is immaterial.⁶ It is not necessary that the railroad company shall have had actual notice of the presence of property along its line.⁷

motive of another company permitted to run over its track, and whose want of proper appliances is known to its agents: *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214; *Pierce v. R. R. Co.*, 51 N. H. 590; *Stearns v. R. R. Co.*, 46 Me. 96.

¹ *Pierce v. R. R. Co.*, 51 N. H. 132; *Davis v. R. R. Co.*, 121 Mass. 134.

² *Rowell v. R. R. Co.*, 57 N. H. 132;

24 Am. Rep. 59; *Ingersoll v. R. R. Co.*, 8 Allen, 438.

³ *Pratt v. R. R. Co.*, 42 Me. 579.

⁴ *Trask v. R. R. Co.*, 16 Gray, 71.

⁵ *Chapman v. R. R. Co.*, 37 Me. 92.

⁶ *Pratt v. R. R. Co.*, 42 Me. 579; *Perley v. R. R. Co.*, 98 Mass. 414; 96 Am. Dec. 645; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454.

⁷ *Ross v. R. R. Co.*, 6 Allen, 87.

TITLE XVII.
ANIMALS.

TITLE XVII.

ANIMALS.

CHAPTER LXXII.

TITLE TO AND OWNERSHIP OF ANIMALS.

- § 1365. Wild and tame animals — Definitions.
- § 1366. Tame animals subjects of property.
- § 1367. Wild animals not property, unless tamed or captured.
- § 1368. Pursuit alone not enough.
- § 1369. Captured wild animals regaining liberty.
- § 1370. Right to increase of animals.
- § 1371. Regulation of keeping of animals by statute.

§ 1365. Wild and Tame Animals—Definitions.—Animals, as used in this title, mean “living beings, inferior to man, having the power of voluntary motion.”¹ Animals are either tame or wild, the latter being called, in the law, animals *feræ naturæ*.

§ 1366. Tame Animals Subjects of Property.—Tame animals are the subjects of absolute property. Thus one may have property in a dog,² a turkey,³ a peacock,⁴ a cat,⁵

¹ Rapalje and Lawrence's Dict., tit. Animals. In *Reiche v. Smythe*, 13 Wall. 162, it was held that “animals” in a revenue law did not embrace birds and fowls. Horses are “domestic animals”: *Osborn v. Lenox*, 2 Allen, 207. Parrots are not *per se* “domestic animals”: *Swan v. Saunders*, 14 Cox, 567; *Lawson's Defenses to Crime*, 486; nor dogs: *State v. Harriman*, 75 Me. 562; 46 Am. Rep. 423. Tame buffaloes are not “cattle”: *State v. Crenshaw*, 22 Mo. 457.

² *Harrington v. Miles*, 11 Kan. 480; 15 Am. Rep. 355; *Wheatley v. Harris*,

4 Sneed, 468; 70 Am. Dec. 259; *Parker v. Mise*, 27 Ala. 480; 62 Am. Dec. 776; *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677; *Dunlap v. Snyder*, 17 Barb. 561; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 174; *State v. McDuffie*, 34 N. H. 523; 69 Am. Dec. 516; *Spray v. Ammerman*, 66 Ill. 309; *Uhlien v. Cromack*, 109 Mass. 273.

³ *State v. Turner*, 66 N. C. 61.8

⁴ *Com. v. Beaman*, 8 Gray, 497.

⁵ *Whittingham v. Ideson*, 8 U. C. L. J. 14. In an action against a warehouseman to recover for damage to goods caused by rats, keeping cats

a mocking-bird,¹ a canary-bird,² and, of course, in horses and cattle.³ It is not necessary for the maintenance of an action for killing a dog that the dog should be shown to be of pecuniary value.⁴

ILLUSTRATIONS. — In trespass for killing a dog, the plaintiff, to increase the damages, gave evidence of his good qualities and value. *Held*, that defendant was entitled to show that his character was bad, and that he was addicted to worrying sheep: *Dunlap v. Snyder*, 17 Barb. 561; *Lentz v. Stroh*, 6 Serg. & R. 34.

§ 1367. **Wild Animals not Property, unless Tamed or Captured.** — Wild animals are not the subjects of property, unless tamed or captured, and taken possession of or killed, in which cases they become the property of the

about the premises is evidence of diligence on his part: *Cailiff v. Danvers*, 1 Peake, 155. So keeping a terrier dog: *Taylor v. Secrist*, 2 Disn. 299. Keeping a cat on board ship has been held to be evidence of due diligence, so as to render a leak caused by rats a "peril of the sea." See *Aymar v. Astor*, 6 Cow. 267; *Garrigues v. Coxe*, 1 Binn. 592; 2 Am. Dec. 493. But see *Laveroni v. Drury*, 16 Eng. L. & Eq. 510; 16 Jur. 1024.

¹ *Haywood v. State*, 41 Ark. 479.

² In *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764, the court say: "The law of Georgia is, that to have property in animals, birds, and fishes which are wild by nature, one must have them within his actual possession, custody, or control, and this he may do by taming, domesticating, or confining them. The answer of the *ex officio* justice of the peace in this case, the same being a *certiorari*, and no traverse thereof, must be taken as true; and it says that, according to the testimony of all the witnesses, the bird in controversy was shown to have been tamed. It was also testified that it had been in the possession of the plaintiff in the warrant about two years; that it knew its name, and when called by its owner, would answer the call; that it had left its cage on one occasion, and after having been gone a day or two, returned; that on

the twenty-seventh day of December, before the preceding New-Year's Day, it was missing from its cage, and on the latter day it was received and taken possession of by the defendant, who had kept it in confinement ever since. Under this evidence there does not seem to be any question of sufficient possession and dominion over this bird to create a property right in the plaintiff. To say that if one has a canary-bird, mocking-bird, parrot, or any other kind of bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold that the traveling organist with his attendant monkey, if it should slip its collar and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner, and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion."

³ A registered cattle-brand is *prima facie* proof of ownership: *De Garca v. Galvan*, 55 Tex. 53.

⁴ *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec. 677.

possessor. But the right to them is in the owner of the land in which they are started and captured, and not in the captor.¹ A buffalo which has been tamed and reared with domestic cattle is the subject of property.² The title to wild animals can be gained only by possession.³ But "actual bodily seizure is not indispensable to acquire right to or possession of wild beasts, but, on the contrary, the mortal wounding of such beasts by one not abandoning his pursuit may with the utmost propriety be deemed possession of him, since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his own use, has deprived him of his natural liberty, and brought him within his certain control. So also encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty and render escape impossible, may justly be deemed to give possession of them to those persons who by their industry and labor have used such means of apprehending them."⁴

Wild bees in a tree belong to the owner of the land, and not to the finder.⁵ Inclosing wild bees in hives gives property in them.⁶ Merely marking one's initials on a tree on which he has discovered a hive of bees gives no title to the bees.⁷ "An unreclaimed swarm, like all other wild animals, belongs to the first occupant,—in other words, to the person who first hives them; but if a swarm fly from a hive to another, his qualified property continues so long as he can keep them in sight and possess the

¹ *Goff v. Kilts*, 15 Wend. 550; *Blades v. Higgs*, 12 Com. B., N. S., 501; 13 Com. B., N. S., 848; 11 H. L. Cas. 621. Game killed by a trespasser belongs to the owner of the land: *Blades v. Higgs*, 11 H. L. Cas. 621.

² *Ulery v. Jones*, 81 Ill. 403.

³ *Pierson v. Post*, 3 Caines, 175; 2 Am. Dec. 264.

⁴ *Pierson v. Post*, 3 Caines, 175; 2 Am. Dec. 264.

⁵ *Adams v. Burton*, 43 Vt. 36; *Idol v. Jones*, 2 Dev. 162; *Ferguson v.*

Miller, 1 Cow. 244; 13 Am. Dec. 519; *Gillet v. Mason*, 7 Johns. 16; *Cock v. Weatherby*, 5 Smedes & M. 333; provided they are an unreclaimed swarm: *Goff v. Kilts*, 15 Wend. 551.

⁶ *Gillet v. Mason*, 7 Johns. 16. Though confined in the top of a tree by the owner of the tree, they are not property until secured: *Wallis v. Mease*, 3 Binn. 546.

⁷ *Gillet v. Mason*, 7 Johns. 16; *Ferguson v. Miller*, 1 Cow. 244; 13 Am. Dec. 519.

power to pursue them. Under these circumstances no one else is entitled to take them.”¹ A trespasser who places in a tree on another's land a box for bees to hive in cannot maintain trover against a third person for taking bees and honey from the box.²

Doves are *feræ naturæ*, but they may become property, if they are confined in a pigeon-house, or if they are in a nest and unable to fly.³ Pigeons which are so tame that they return every night to their houses are property,⁴ and so are wild geese of similar habits,⁵ and so are partridges hatched by a common hen and reared with her brood.⁶ Carrier-pigeons belong to their owner, even when absent and flying across the country.⁷

Property is acquired in a whale by killing, capturing, and marking it, and leaving it floating on the ocean.⁸ By usage recognized in the courts, a whale belongs to the crew which first harpoons it;⁹ or to the person who kills a whale by a bomb, no matter who may afterwards find it.¹⁰ No property is acquired in fish by spreading a net for them and enticing them there, until they are actually encompassed.¹¹ Oysters planted by a person in a bed in a navigable water are the property of him who plants them.¹²

¹ Goff v. Kilts, 15 Wend. 551.

² Rexroth v. Coon, 15 R. I. 35; 2 Am. St. Rep. 863.

³ Com. v. Chace, 9 Pick. 15; 19 Am. Dec. 348.

⁴ R. v. Brooks, 4 Car. & P. 131.

⁵ Amory v. Flynn, 10 Johns. 102; 6 Am. Dec. 316.

⁶ R. v. Shickle, L. R. 1 C. C. 158.

⁷ See 23 Alb. L. J. 482.

⁸ Taber v. Jenny, 1 Sprague, 215; Bartlett v. Budd, 1 Low. 223.

⁹ Swift v. Gifford, 2 Low. 110.

¹⁰ Ghen v. Rich, 8 Fed. Rep. 159.

¹¹ Young v. Hichens, 6 Ad. & E., N. S., 606.

¹² Decker v. Fisher, 4 Barb. 592; Brinckerhoff v. Starkins, 11 Barb. 248; Lowndes v. Dickerson, 34 Barb. 586; Fleet v. Hegeman, 14 Wend. 42; the court saying: "Oysters have not the power of locomotion any more than

inanimate things, and when property has once been acquired in them, no good reason is perceived why it should not be governed by the rules of law applicable to inanimate things. But it is contended they fall within the rules of law applicable to animals denominated *feræ naturæ*, the same as deer in the forest, pigeons in the air, or fish in public waters of the ocean. A qualified property is acquired in these by reclaiming and taming them, or by so confining them within the immediate power of the owner as to prevent their escape and the use of their natural liberty. Deer in a park, hare or rabbits in a warren, or fish in private ponds or trunks, are instances of this description. These, it is said, are the property of a man no longer than while they continue in his keeping or possession. Manufacture is

They are not considered as abandoned to the public unless planted in a place where oysters grow naturally.¹

§ 1368. **Pursuit alone not Enough.**—Pursuit alone gives no right of property in animals *feræ naturæ*.² Thus where A started a fox with his hounds, and while he was chasing it, B, seeing that A was in pursuit of it, stepped in and killed and took it himself, it was held that A had no property in it as against B.³ So a person who has nearly got a lot of fish in his net has no action against one who, by splashing the water, frightens them so that they escape.⁴ So marking one's initials on a tree on which he has discovered a hive of bees gives him no title to the bees.⁵ So where, after wounding a deer, the pursuer continued the chase until the evening, and then abandoned it until the morning, between which time it

not necessary to acquire much less to continue possession of this property: 3 Caines, 178. If a deer or any wild animal reclaimed hath a collar or other mark put upon him, and goes and returns at pleasure, it is not lawful for any one else to take him; though if he be long absent without returning, it is otherwise. In all these cases of wild animals reclaimed, the property is not absolute, but defeasible by the animals resuming their ancient wildness, and going at large; as if the deer escape from the park, or the fishes from the pond or trunk, and are found at large in their proper element, they become *feræ naturæ* again, and are free to the first occupant that may seize them. But while they continue the owner's qualified property, they are under the protection of the law, as much so as if they were absolutely and indefeasibly his, and an action will lie for an injury committed: 2 Bla. Com. 395-397; 3 Co. Litt. 294, note c.; Case of The Swans, 7 Coke, 86; 8 Vin. Abr., tit. Property, B. It is clear, from the principles and cases above mentioned, that the right to appropriate property of the description in question does not depend exclusively

upon the place where they are found, but upon the fact that they are *feræ naturæ* unreclaimed; for though the deer should be found browsing in his own forest, and the pigeons flying in the air, or any of the class reclaimable at large, if they have been, in fact, domesticated and possess the *animus revertendi*, they are not common property, and the occupant who takes them gets no title; and if he takes them knowing their condition, he becomes a trespasser. This is clear upon well-settled authority. The right of the plaintiff to oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans or other water-fowl that may float habitually in the bay."

¹ State v. Taylor, 27 N. J. L. 117; 72 Am. Dec. 347.

² Pierson v. Post, 3 Caines, 175; 2 Am. Dec. 264.

³ Pierson v. Post, 3 Caines, 175; 2 Am. Dec. 264.

⁴ Young v. Hichens, 6 Ad. & E., N. S., 606.

⁵ Ferguson v. Miller, 1 Cow. 244; 13 Am. Dec. 59; Gillet v. Mason, 7 Johns. 16.

was killed by another, the former was held to have no title to it.¹

§ 1369. **Captured Wild Animal Regaining Liberty.**—A wild animal reclaimed or taken possession of is the property of the possessor while such possession lasts. If it regains its natural liberty as a wild animal, his rights cease.² But an animal does not regain its natural liberty by merely straying away from the owner.³

§ 1370. **Right to Increase of Animals.**—The increase of a domestic animal belongs to the owner of the mother;⁴ or, if the animal is hired at the time to another, to the hirer.⁵ A mortgage of a domestic animal will cover its increase.⁶ But a mortgage of a cow would not cover her calf after weaning-time.⁷ Where a bequest of stock is made to a tenant for life, he must keep up the original number,⁸ but a tenant for life has a right to the increase.⁹ The ownership of a sheep and of its fleece is not separable.¹⁰ A sale of sheep carries the wool on them, and renders the seller by whom they were shorn before delivery liable therefor to the buyer.¹¹

ILLUSTRATIONS.—A father told his son that if he would take one of his mares to horse and pay for the same, the foal should

¹ *Buster v. Newkirk*, 20 Johns. 75.

² "Animals *feræ naturæ* when reclaimed by the act and power of man are the subjects of a qualified property; if they return to their natural liberty and wildness without the *animus revertendi*, it ceases"; *Goff v. Kilts*, 15 Wend. 551. A domestic animal temporarily astray is presumed to have an *animus revertendi*; *People v. Kaatz*, 3 Park. Cr. 129.

³ *Amory v. Flynn*, 10 Johns. 103; 6 Am. Dec. 316.

⁴ *Stewart v. Ball*, 33 Mo. 154; *Hanson v. Millett*, 55 Me. 184; *Concklin v. Havens*, 12 Johns. 314; *Orser v. Storms*, 9 Cow. 687; 18 Am. Dec. 543; *Hazelbacker v. Goodfellow*, 64 Ill. 238; *Tyson v. Simpson*, 2 Hawy. 147.

⁵ *Putnam v. Wigley*, 8 Johns. 432;

5 Am. Dec. 346. See *Orser v. Storms*, 9 Cow. 687; 18 Am. Dec. 543.

⁶ *Fonville v. Casey*, 1 Murph. 389; 4 Am. Dec. 559; *Gundy v. Biteler*, 6 Ill. App. 500; *Evans v. Menken*, 8 Gill & J. 39; *McCarty v. Blevins*, 5 Yerg. 195; 26 Am. Dec. 262; *Forman v. Proctor*, 9 B. Mon. 124; *Kellogg v. Lovely*, 46 Mich. 131; 41 Am. Rep. 151.

⁷ *Winter v. Landphere*, 42 Iowa. 471.

⁸ *Hovey v. Glover*, 2 Hill (S. C.) 521.

⁹ *Lewis v. Davis*, 3 Mo. 133; 23 Am. Dec. 698; *Poindexter v. Blackburn*, 1 Ired. Eq. 286; *Evans v. Iglehart*, 6 Gill & J. 171; *Saunders v. Houghton*, 8 Ired. Eq. 217; 57 Am. Dec. 581.

¹⁰ *Hasbrouck v. Bouton*, 60 Barb. 413; 40 How. Pr. 208.

¹¹ *Groat v. Gile*, 51 N. Y. 431.

be his property. The son did so, and afterwards had the complete and uncontrolled possession of the foal. *Held*, that the property in the foal became invested in the son: *Linnendoll v. Doe*, 14 Johns. 222.

§ 1371. Regulation of Keeping of Animals by Statute.

—The state has a right to regulate the keeping of dogs, and to authorize their summary destruction when the prescribed regulations are not complied with.¹ Statutes allowing towns to impose a specific tax for keeping a dog, and if the tax be not paid, to kill the dog as a nuisance, are not unconstitutional.² The legislature has the power to encourage the rearing of sheep, and, with that object in view, may pass a law to discourage the keeping of dogs by assessing a penalty upon the owner or keeper of the latter.³ So a statute simply requiring a license fee from the owners of dogs is constitutional.⁴ A statute authorizing, "for the privilege of keeping each stallion or jack, a tax equal to the amount for which every such stud-horse or jack shall stand for the season," is unconstitutional.⁵ And a statute of New York authorizing any person to seize and take into his custody "any animal which may be trespassing upon premises owned and occupied by him," to be sold and disposed of as directed by the act for the payment of the penalties imposed by it for such trespass, was held unconstitutional, on the ground that it is not competent for the legislature to punish the owner of cattle for a casual and private trespass upon another's premises, such power not being necessary to carry out any of the objects committed to the legislative discretion, and not being a matter of public concern, so as to bring it within the police power of the legislature.⁶

¹ *Blair v. Forehand*, 100 Mass. 136; 1 Am. Rep. 94.

² *Mowery v. Salisbury*, 82 N. C. 175.

³ *Mitchell v. Williams*, 27 Ind. 62; *Carter v. Dow*, 16 Wis. 298; *Tenney v. Lenz*, 16 Wis. 566.

⁴ *Mitchell v. Williams*, 27 Ind. 62; *State v. Connall*, 27 Ind. 120.

⁵ *Gibson v. Pulaski*, 2 Ark. 309.

⁶ *Leavitt v. Thompson*, 56 Barb. 542. And see *McConnell v. Van Aernam*, 56 Barb. 534; *Campbell v. Evans*, 54 Barb. 566; *Fox v. Duncel*, 55 Barb. 431; 38 How. Pr. 136.

CHAPTER LXXIII.

RIGHTS OF OWNERS OR KEEPERS OF ANIMALS.

- § 1372. Action for taking or detaining animal.
- § 1373. Action for killing or injuring animal.
- § 1374. Defenses — Killing ferocious animal.
- § 1375. Killing animal in defense of person.
- § 1376. Killing animal which is a nuisance.
- § 1377. Killing animal in defense of property.
- § 1378. Statutory authority for killing dogs or other animals.
- § 1379. Killing or injuring trespassing animals — Impounding.
- § 1380. Rights and liabilities of finders of animals.

§ 1372. **Action for Taking or Detaining Animal.**—The owner of an animal has a right of action against one who wrongfully takes it into his possession or detains it against his will. Thus a person who finds a horse at large and uses him is liable to the owner, if he is injured by such user.¹ A drover who, in driving a herd on the highway to market, also drives along with it the cattle of another person, which are running at large in the highway, and which join the herd, is liable in trespass if he knows they do not belong to him, or if, having had his attention called to them, he does not use proper diligence in ascertaining whether he owns them. He is not liable if he does not notice them in the herd.² A person has no right to detain a domestic animal belonging to another, which has strayed on his land and done damage, until the owner has paid the damage.³ An officer has no right to detain horses running at large contrary to an ordinance, where they have escaped from their owner against his will, and he immediately goes in pursuit of them.⁴ The owner of a shade-tree, finding another's horse hitched to it, is not liable in trespass for removing the horse to a safe place.⁵

¹ *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

² *Young v. Vaughan*, 1 Houst. 331.

³ *Ladue v. Branch*, 42 Vt. 574.

⁴ *Kinder v. Gillespie*, 63 Ill. 88.

⁵ *Gilman v. Emery*, 54 Me. 460.

§ 1373. **Action for Killing or Injuring Animal.**—The owner of an animal has a right of action against one who wrongfully kills or injures it.¹ Such actions have been sustained by the owners of cats,² cattle,³ dogs,⁴ hens,⁵ horses and mules,⁶ sheep,⁷ and swine.⁸ Actions have been sustained for injuring a horse by chasing him from a field with a fierce dog,⁹ for injuring a horse by driving a wagon against him in the highway,¹⁰ and for killing other

¹ In *Blair v. Forehand*, 100 Mass. 140, 97 Am. Dec. 83, it is said: "In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purposes for which they are kept. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle, and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild natures and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons, as he would be for the trespasses of his cattle: *Vin. Abr.*, tit. Trespass, Z; *Replevin*, A; 2 *Bla. Com.* 193; 3 *Bla. Com.* 7; 4 *Bla. Com.* 234, 235; *Mitten v. Faudrye*, *Poph.* 161; *sub nom.*, *Millen v. Fawen*, *Benl. N.* 171; *Mason v. Keeling*, 1 *Ld. Raym.* 608; 12 *Mod.* 336; *Read v. Edwards*, 17 *Com. B.*, *N. S.*, 245; *Regina v. Robinson*, 8 *Cox's C. C.* 115. And dogs have always been held by the American courts to be entitled to

less legal regard and protection than more harmless and useful domestic animals: *Putnam v. Payne*, 13 *Johns.* 312; *Brown v. Carpenter*, 26 *Vt.* 638; 62 *Am. Dec.* 603; *Woolf v. Chalker*, 31 *Conn.* 121; 81 *Am. Dec.* 175."

² *Whittington v. Ideson*, 8 *U. C. L. J.* 14.

³ *Van Leuven v. Lyke*, 1 *N. Y.* 515; 49 *Am. Dec.* 346.

⁴ *Uhlein v. Cromack*, 109 *Mass.* 273; *Brent v. Kimball*, 60 *Ill.* 211; 14 *Am. Rep.* 35; *Wheatley v. Harris*, 4 *Sneed*, 463; 70 *Am. Dec.* 258; *Perry v. Phipps*, 10 *Ired.* 259; 51 *Am. Rep.* 387; *Dodson v. Mock*, 4 *Dev. & B.* 146; 32 *Am. Dec.* 677; *Parker v. Mise*, 27 *Ala.* 480; 62 *Am. Dec.* 776. But it is held in Georgia in a recent case that no action lies for negligently killing a dog: *Jemison v. R. R. Co.*, 75 *Ga.* 444; 58 *Am. Rep.* 476. The dog in this case was killed by a locomotive while on the track. "That the owner, at the common law and under our code," said the court, "may maintain trespass *vi et armis* for wantonly and maliciously killing his dog, is not questioned, but it is equally clear by that law that he could not maintain case for its unintentional though negligent destruction": *And see Wilson v. R. R. Co.*, 10 *Rich.* 52.

⁵ *Clark v. Keliher*, 107 *Mass.* 406; *Johnson v. Patterson*, 14 *Conn.* 1; 35 *Am. Dec.* 96; *Matthews v. Fiestil*, 2 *E. D. Smith*, 90.

⁶ *Bishop v. Ely*, 9 *Johns.* 294; *Dolph v. Ferris*, 7 *Watts & S.* 367; 42 *Am. Dec.* 246.

⁷ *Besant v. R. R. Co.*, 8 *Com. B.*, *N. S.*, 368.

⁸ *Morse v. Nixon*, 6 *Jones*, 293.

⁹ *Amick v. O'Hara*, 6 *Blackf.* 268.

¹⁰ *Bishop v. Ely*, 9 *Johns.* 294.

animals in various ways.¹ The owner of a mare injured by service *per rectum* by defendant's stallion need not prove negligence.² One who negligently constructs or maintains a barbed-wire fence in a dangerous condition between his land and the adjacent highway is liable for an injury thereby occasioned to domestic animals lawfully running at large, and which are attracted within the inclosure by the presence of other animals and growing pasture.³ The owner of a horse entered for a race takes all the risks incident to the race; and if a horse is intentionally fouled, or purposely runs against or interferes with a competing horse in the race by the rider, the employer of such rider is liable for damages for any injury which results. If a jockey attempts to take the track ahead of another horse before his horse is a clear length ahead of the other horse, or if he crowds the other horse so as to impede him, or compels his jockey to hold him in or change his course to avoid a collision, it would be foul riding; and the fact that the rider who attempts a foul runs as great risk to himself and his horse as he imposes on his competitor will not justify him in attempting a foul.⁴

§ 1374. **Defenses — Killing Ferocious Animal.** — A person may lawfully kill a ferocious and dangerous dog running at large without a muzzle,⁵ as a dog that has been bitten by a mad dog;⁶ and it is not necessary to show that

¹ See cases *supra*.

² *Peer v. Ryan*, 54 Mich. 224.

³ *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213.

⁴ *McKay v. Irvine*, 11 Biss. 168.

⁵ *Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638; 62 Am. Dec. 605; *Woolf v. Chalker*, 31 Conn. 130; 81 Am. Dec. 175; *Keck v. Halstead*, Lutw. 1494; *King v. Kline*, 6 Pa. St. 318; *Perry v. Phipps*, 10 Ired. 259; 51 Am. Dec. 387; *Dunlap v. Snyder*, 17 Barb. 561; *Dodson v. Mock*, 4 Dev. & B. 146; 32 Am. Dec.

677; *Parrott v. Hartsfield*, 4 Dev. & B. 110; 32 Am. Dec. 673; *Hinckley v. Emerson*, 4 Cow. 351; 15 Am. Dec. 333.

⁶ *Putnam v. Payne*, 13 Johns. 312. See *Wallace v. Douglas*, 10 Ired. 79, as to statutory obligation of owner of mad dog to kill it. In *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 605, the court, speaking of a dog which it was proved had bitten people, though at the time it was killed it was doing no harm, said: "To say that such a dog is not the common annoyance and

the owner had knowledge of his ferocious disposition.¹ It is lawful to kill a dog by which one has been bitten, whether mad or not.² It is no defense that the dog was a dangerous dog and had bitten persons, if it was kept chained by the plaintiff on his premises, or had not attacked the defendant.³ A statute authorizing the killing of unlicensed dogs "wherever found" does not protect a person who enters another's house without his consent and kills such a dog.⁴

§ 1375. Killing Animal in Defense of Person.—One may lawfully kill an animal which attacks him.⁵ And the right of self-defense against an attack by an animal is not restricted, as it is in the case of an attack by an individual; the danger need not be imminent, and the party attacked need not be in particular danger.⁶

terror of a neighborhood is to deny what every man knows to be emphatically true. Some animals are common nuisances if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats: *Bull. N. P. 76*; *King v. Huggins*, 2 *Ld. Raym.* 1583; and domestic animals, from their ferocious and dangerous habits becoming known to their keepers, thus become common nuisances if not restrained. But such an animal is quite as obviously within the general definition of a common nuisance as a wolf or a wild-cat or a bear, and if allowed to go at large, as really deserves to be destroyed. If any animal should be regarded as the common terror of all peaceable and quiet-loving citizens, it is such a dog; and the owner who persists in keeping such an animal without effectually and physically restraining him so that he can do no one harm, ought not to complain of his destruction. He ought to be grateful to escape so; for he undoubtedly is liable to, and justly deserves, exemplary punishment, under the criminal laws of the state; and, if one injured, or liable to injury, chooses to right himself by abating

the nuisance only, he deserves to be regarded as a public benefactor."

¹ "I doubt if it be necessary in this and like cases to prove a *scienter* upon the owner. If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once": *Maxwell v. Palmerton*, 21 *Wend.* 407. Proof that the dog was ferocious is not restricted to a year: *Boecher v. Lutz*, 13 *Daly*, 28.

² *Bowers v. Fitzrandolph*, *Add.* 215.

³ *Uhlein v. Cromack*, 109 *Mass.* 273.

⁴ *Kerr v. Seaver*, 11 *Allen*, 151.

Similar ruling at common law in *Perry v. Phipps*, 10 *Ired.* 259; 51 *Am. Dec.* 387.

⁵ As a dog: *Credit v. Brown*, 10 *Johns.* 365; *Hinckley v. Emerson*, 4 *Cow.* 352; 15 *Am. Dec.* 383; *Reynolds v. Phillips*, 13 *Ill. App.* 557; *Dunning v. Bird*, 24 *Ill. App.* 270; or a bull: *Russell v. Barrow*, 7 *Port.* 106.

⁶ *Aldrich v. Wright*, 53 *N. H.* 398; 16 *Am. Rep.* 339; *Vere v. Cander*, 11 *East*, 568; *Perry v. Phipps*, 10 *Ired.* 259; 51 *Am. Dec.* 387. In *Perry v. Phipps*, 10 *Ired.* 259, 51 *Am. Dec.* 387, the court say: "A person is not bound to stand quietly and be bitten by a dog, nor to give him what might be

§ 1376. **Killing Animal Which is a Nuisance.**—The inhabitants of a dwelling-house have a right to kill a dog which, by howling and barking by day and night, disturbs their peace and repose.¹

§ 1377. **Killing Animal in Defense of Property.**—If necessary to protect animals from being killed, their owner may kill the attacking animal.² Thus a dog may be killed which is chasing conies in a warren or deer in a park,³ or which is worrying or chasing fowl,⁴ or sheep;⁵ or an unmuzzled dog which attacks a muzzled one.⁶ Notwithstanding a statute prohibiting the killing of mink

called a fair fight among men. But if a fierce and vicious dog be allowed to go at large, and he runs at a person as he lawfully goes to a house or is passing along the road, apparently to set on a person, or, for example, on the horse he is riding, it seems but reasonable the person should protect himself from the injury of a bite to himself or his horse by killing the dog; for although a man has a right to keep a dog for the protection of his house and yard, yet he ought to keep him secured, and not let him loose and uncontrolled at such hours and in such places as will endanger peaceable and honest people engaged in their lawful business. If, therefore, this dog were one of the kind supposed, and the defendant had shot him as he came at him, and when he had reasonable grounds to think that the dog could not be restrained by the owner or his family, and would bite him, we should hold that he did no more than he had a right to do. But when the plaintiff's family were at home, and, by their immediate interference and commands and punishment, governed and drove away the dog, so as not only to prevent him from biting the defendant at that time, but also to save the defendant from all danger then by driving the dog away, the killing of the dog after that, and against the urgent entreaties of the family, could have been only on the pretense and not on the reality of protecting the defendant from an attack at that time "

¹ *Brill v. Flagler*, 23 Wend. 355; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175. In *Dodson v. Mock*, 4 Dev. & B. 146, 32 Am. Dec. 677, the court said: "It is not denied that a dog may be of such a ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person. But it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him *flagrante delicto*; that on another occasion he barked at the doctor's horse; and that he was shrewdly suspected in early life to have worried a sheep,—make up a catalogue of offenses not very numerous, nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated."

² *Hinckley v. Emerson*, 4 Cow. 351; 15 Am. Dec. 383.

³ *Maxwell v. Palmerton*, 21 Wend. 407; *Wadhurst v. Damme*, Cro. Jac. 45; *Barrington v. Turner*, 3 Lev. 28.

⁴ *Janson v. Brown*, 1 Camp. 41; *Leonard v. Wilkins*, 9 Johns. 234.

⁵ *Brown v. Hoberger*, 52 Barb. 15.

⁶ *Boecher v. Lutz*, 13 Daly, 28.

during certain months, a person may justify such a killing by showing that the mink were killed while they were chasing his geese on his land.¹ Where an ass attacks a cow, and the owner of the latter believes it to be necessary to save it, he may kill the ass.² It is said in an Illinois case that the natural right of a man to defend his domestic animals upon his own premises from the attacks of dogs is not taken away by the decisions of the common-law courts, nor by the Illinois statutes. His right of action against the owner of the dogs for the injury done by them is merely cumulative to his prior right of making a reasonable defense to protect his property therefrom. The relative value of the assailing and assailed animals must be considered. This was held in an action for the killing of two Irish thoroughbred setter pups that had attacked a thoroughbred hen of the Plymouth Rock breed.³ But it is not justifiable to kill a dog after he has stopped chasing sheep,⁴ unless there is reason to apprehend his returning;⁵ or after he has come from chasing deer in a park, and is with his master in the highway.⁶ One cannot justify his killing his neighbor's dog by showing merely that he had reasonable cause to believe the dog to be on his premises for the purpose of killing his hens;⁷ nor is it justifiable to kill a dog which is chasing trespassing stock off his master's premises.⁸ But an animal may lawfully be killed which is destroying other property.⁹ Where a person hung fish up to dry on the wall of his house, and a dog entered the premises, and

¹ *Aldrich v. Wright*, 53 N. H. 398; 16 Am. Rep. 340.

² *Williams v. Dixon*, 65 N. C. 416.

³ *Anderson v. Smith*, 7 Ill. App. 354.

⁴ *Wells v. Head*, 4 Car. & P. 568.

⁵ *Parrott v. Hartsfield*, 4 Dev. & B. 110; 32 Am. Dec. 673. The owner of domestic animals is justified in killing a dog which is harassing, maiming, or worrying the animals; and the killing is justifiable, even if at the time the dog is not committing the act,

provided his conduct is such as to excite a reasonable apprehension that he is about to do so: *Marshall v. Blackshire*, 44 Iowa, 475.

⁶ *Protheroe v. Mathews*, 5 Car. & P. 581.

⁷ *Livermore v. Batchelder*, 141 Mass. 179.

⁸ *Spray v. Ammerman*, 66 Ill. 309.

⁹ *King v. Kline*, 6 Pa. St. 318; *Cane-fox v. Crenshaw*, 24 Mo. 199; 69 Am. Dec. 427.

was discovered in the act of eating the fish, and driven away, and on his coming again was caught in a trap and shot, this was held justifiable.¹ So a person may shoot pigeons which are injuring his crops,² or a hog which is pursuing his chickens.³

§ 1378. **Statute Authority for Killing Dogs and Other Animals.**—By statute the right to kill dogs and other animals has been enlarged.⁴ Thus dogs running at large, not licensed or wearing collars or muzzles in certain seasons, have been declared outlaws, and liable to be killed by any one. The legislature, by virtue of its police power, may authorize a city to ordain that dangerous animals be summarily destroyed by the city authorities without notice to the owners; and such killing of an unlicensed dog creates no liability for its loss.⁵ “Running at large” in a statute as to animals means strolling without restraint or confinement, or wandering at will unrestrained. The restraint need not be physical, but may depend upon the habits or instinct of the animal.⁶ A dog is “going at large” in a town, if he be loose and following the person who has charge of him through the streets of the town at such a distance that he cannot exercise a control over the dog which will prevent his doing mischief.⁷ Under the statute of Kentucky, a person who finds a dog at large on his premises without its owner or keeper has a right to kill it, no matter what temptation enticed the dog to leave home.⁸ A dog at play with his owner’s son upon the owner’s land is not “at large,” and a constable who, under such circumstances, calls such a dog away and shoots at it while on the owner’s land, and then enters the premises

¹ *King v. Kline*, 6 Pa. St. 318.

² *Taylor v. Newman*, 4 Best & S. 89.

³ *Morse v. Nixon*, 6 Jones, 293. But it appears from this case that a hog is entitled to more consideration than a dog, and the evidence of necessity must be clear to justify his destruction.

⁴ And see *ante*, § 1371.

⁵ *Leach v. Elwood*, 3 Ill. App. 453; *Blair v. Forehand*, 100 Mass. 136; 97 Am. Dec. 82.

⁶ *Russell v. Cone*, 46 Vt. 600.

⁷ *Commonwealth v. Dow*, 10 Met. 332.

⁸ *Bradford v. McKibben*, 4 Bush, 545.

and attempts to shoot it again, is liable in damages.¹ A statute permitting the killing of dogs not registered "going at large" does not authorize an officer in entering a person's dwelling-house without his leave.² A statute authorizing the killing of any dog found without a collar is constitutional.³ Engraving upon the collar of a dog the initials of the owner's name is not engraving on the collar "the name of the owner" of the dog within a statute requiring this.⁴ Under the Massachusetts statute which authorizes "any person to kill any dog or dogs found and being without a collar," it is lawful to kill a dog without a collar out of its master's inclosure, although under his immediate care, and although this is known to the person killing the dog.⁵ But it is held that under the Indiana statute providing that it shall be deemed unlawful for any dog to run at large without a collar and tag, and it shall be deemed lawful for any person to kill the same, a dog without a collar, but not at large, cannot be lawfully killed by a private person.⁶ A statute authorizing "any person" to kill an unlicensed dog does not protect the owner of a dog which kills another dog.⁷ By a Delaware statute any one may kill with impunity a dog which at any time has killed, wounded, or worried sheep.⁸ If a dog be seen pursuing and barking at sheep, it is a "worrying" of them.⁹ Under a statute providing that certain dogs may be killed "whenever and wherever found," an officer may enter a person's close without his permission to kill such a dog.¹⁰ An officer is not guilty of conversion of a dog's collar, who under authority of law kills the dog and leaves the body with the collar on where he first found the dog.¹¹

¹ *McAneany v. Jewett*, 10 Allen, 151.

² *Bishop v. Fahay*, 15 Gray, 61.

³ *Morey v. Brown*, 42 N. H. 373.

⁴ *Morey v. Brown*, 42 N. H. 373.

⁵ *Tower v. Tower*, 18 Pick. 262.

⁶ *Lowell v. Gathright*, 97 Ind. 313.

⁷ *Heisrodt v. Hackett*, 34 Mich. 283;
22 Am. Rep. 529.

⁸ *Milman v. Schockley*, 1 Houst.
444.

⁹ *Campbell v. Brown*, 1 Grant Cas.
82.

¹⁰ *Blair v. Forehand*, 100 Mass. 136;
1 Am. Rep. 94; 97 Am. Dec. 82.

¹¹ *Blair v. Forehand*, 100 Mass. 136;
97 Am. Dec. 82.

§ 1379. **Killing or Injuring Trespassing Animals—Impounding.**—The owner of land is not, as a rule, liable for an injury to a trespassing animal, received on his land.¹ Thus he is not liable for an injury to an ox which falls into a pit on his land;² or for an injury to cattle from drinking maple-sap left exposed in troughs there,³ or from other things, such as pickle brine and corrosive sublimate;⁴ or for an injury to a horse from the falling of a tree which he has set fire to and left to burn and fall;⁵ or for an injury to a dog which impales himself upon a trap set on the premises.⁶ But an adjoining proprietor has been held liable for the death of his neighbor's horse through his permitting a yew-tree to stand so near the fence that the horse could eat the poisonous leaves from the limbs which projected over the fence.⁷ So has a similar owner who let his wire fence so decay that pieces which fell into the grass were eaten by his neighbor's cow and killed her.⁸ In an early English case, where A kept on his open grounds, near the highway, traps baited

¹ Chicago etc. R. R. Co. v. Patchin, 16 Ill. 201; 61 Am. Dec. 65; Turner v. Thomas, 71 Mo. 597; Railroad Co. v. Skinner, 19 Pa. St. 302; 57 Am. Dec. 654; Gillis v. R. R. Co., 59 Pa. St. 142; 98 Am. Dec. 317; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239; Hughes v. R. R. Co., 66 Mo. 325. An owner of land is not bound to fence against trespassing animals: Lawrence v. Combs, 37 N. H. 331; 72 Am. Dec. 332. In Knight v. Abert, 6 Pa. St. 472, 47 Am. Dec. 478, the court said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a saw-pit, dig a ditch or a mill-race, or open a stone quarry or a mine-hole on his own land, except at the risk of being made liable for consequential damage from it,—which would be a most unreasonable restriction of his enjoyment. He might

as well be required to level a precipice, put a fence round a swamp, or cut down reclining trees. It is enough, in all reason, that his neighbor's cattle have the range of his forest, without imposing on him the duty of looking to their safety. If the owner of them does not choose to enjoy his license on that footing, let him keep them at home or send a herdsman along with them. The law imposes no such duty on the tenant."

² Knight v. Abert, 6 Pa. St. 472; 47 Am. Dec. 478; Hughes v. R. R. Co., 66 Mo. 325; Aurora etc. R. R. Co. v. Grimes, 13 Ill. 595.

³ Bush v. Brainard, 1 Cow. 78; 13 Am. Dec. 513.

⁴ Hess v. Lupton, 7 Ohio, 216.

⁵ Durham v. Musselman, 2 Blackf. 96; 18 Am. Dec. 133.

⁶ Jordin v. Crump, 8 Mees. & W. 782; but see Johnson v. Patterson, 14 Conn. 1; 35 Am. Dec. 96.

⁷ Crowhurst v. Amersham Burial Board, L. R. 4 Ex. Div. 5.

⁸ Firth v. Bowling Iron Co., 3 Com. P. Div. 254.

with stinking meat, whose smell attracted a neighbor's dog, and he was killed, it was held that A was liable, on the ground that A, knowing the natural instincts of such animals, had enticed the dog to its death.¹ In an Indiana case, where a man dug a well on an uninclosed lot in a city, and then abandoned it, covering it with loose boards, and a roving horse fell in, he was held liable, on the ground that, considering the place, the probability was that such a thing would happen, and the land-owner should have guarded against it.²

A person in driving out trespassing cattle must do so in a reasonably careful manner.³ He has no right to wantonly injure them.⁴ But one may use such means as are necessary to drive trespassing animals out of his field, and if it results in the mutilation of the animals, it is not criminal.⁵ One may drive trespassing animals off his land with dogs,⁶ but he may not use a fierce dog for that purpose.⁷ In other words, he must not use unnecessary violence in ejecting the trespassing animal.⁸ He is not liable for the death of a cow caused by her becoming frightened by the dog and attempting to jump a fence.⁹ A person has no right to kill a dog which is merely trespassing on his land and doing no damage;¹⁰ but if it is necessary to protect his property, the dog may be shot.¹¹ The killing of trespassing hens¹² or trespassing turkeys is not justifiable.¹³ That the defendant notified the owner that if he found his animals trespassing on his property he would kill them gives no right; "it is a mere threat to do

¹ *Townsend v. Wathen*, 9 East, 277.

² *Young v. Harvey*, 16 Ind. 314.

³ *McIntire v. Plaisted*, 57 N. H. 606; *Totten v. Cole*, 33 Mo. 138; 82 Am. Dec. 157.

⁴ *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Snap v. People*, 19 Ill. 80; 68 Am. Dec. 582.

⁵ *Avery v. People*, 11 Ill. App. 332.

⁶ *Wood v. Laine*, 9 Mich. 158; *Davis v. Campbell*, 23 Vt. 236; *Clark v. Adams*, 18 Vt. 425; 46 Am. Dec. 161.

⁷ *Amick v. O'Hara*, 6 Blackf. 268.

⁸ *Richardson v. Carr*, 1 Harr. (Del.) 142; 25 Am. Dec. 65.

⁹ *Smith v. Waldorf*, 13 Hun, 127.

¹⁰ *Brent v. Kimball*, 60 Ill. 211; 14 Am. Rep. 35.

¹¹ *Lipe v. Blackwelder*, 25 Ill. App. 119.

¹² *Clark v. Keliher*, 107 Mass. 406; *Johnson v. Patterson*, 14 Conn. 1; 35 Am. Dec. 96.

¹³ *Reis v. Stratton*, 23 Ill. App. 314.

an illegal act, and would not vary the case.”¹ So an angry reply, “Go and kill him, if you want to,” made by the owner of an animal, as a tamed buffalo, to one complaining of a trespass, does not license him to kill it after a lapse of nearly half a year.² The owner of land may drive trespassing animals from his land into the highway and leave them there,³ unless they come through a division fence which he has neglected to keep up, in which case he should turn them back into the adjoining land, and not into the highway.⁴ Where it is the custom of the country to permit stock, boars, and bulls to run at large, and the estray law of the state gives a remedy for their depredations, a person is not justified in injuring one taken in the act of breaking fences or destroying crops.⁵ An owner of domestic animals has the right to pasture them on the commons of incorporated towns, in the absence of regulations to the contrary; and such conduct does not diminish his right to compensation from those who injure them.⁶ Untying and removing a horse from a hitching-post standing on the highway, to which he had been hitched by the plaintiff, being the owner, and to the use of which post the plaintiff had, if not an exclusive right, as good a right as the defendant, is a technical trespass.⁷ The legislature may require owners of stock to keep them from trespassing on the lands of others.⁸

It is not the person's duty to impound the animals or secure them, unless so provided by statute; but if he drives them beyond the highway, and they stray away, he is

¹ *Clark v. Keliher*, 107 Mass. 406; *Johnson v. Patterson*, 14 Conn. 1; 35 Am. Dec. 96.

² *Ulery v. Jones*, 81 Ill. 403.

³ *Humphrey v. Douglass*, 11 Vt. 22; 34 Am. Dec. 668; *Cory v. Little*, 6 N. H. 213; 25 Am. Dec. 458; *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345, holding that he must not drive them into a highway leading away from the direction of the owner's land.

⁴ *Knour v. Wagoner*, 16 Ind. 414; *Clark v. Adams*, 18 Vt. 425; 46 Am. Dec. 161; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Wood v. La Rue*, 9 Mich. 158.

⁵ *Bost v. Mingues*, 64 N. C. 44.

⁶ *Chicago etc. R. R. Co. v. Jones*, 59 Miss. 465.

⁷ *Bruch v. Carter*, 32 N. J. L. 554.

⁸ *Anderson v. Locke*, 64 Miss. 233.

liable.¹ If he puts them in a pound, he must see that it is in a fit and safe condition,² and that they are properly supplied with food and water.³ If there is no sufficient public pound, he may impound them on his own or another's property.⁴ He is not responsible for injuries which they may receive from other cattle in the pound.⁵ When a pound fence intended to confine horses and cattle is proved to be sufficient for the purpose, the mere fact that a horse confined in such pound, and properly cared for there, kills himself by rushing against such fence, or by kicking against it, or by trying to clear it in leaping, does not render the municipal corporation liable.⁶ The keeper of a pound is bound to keep impounded animals in the pound, and there only, unless removal is necessary to save them from injury, and if a constable, with knowledge that an impounded animal has been so removed, sells it at auction at the request of the pound-keeper, the request will not protect him, and he is guilty of a trespass.⁷

ILLUSTRATIONS.—A's mule got into B's grounds in consequence of the insufficiency of B's fence, and he killed it. *Held*, that he was liable to A for its value: *Dickson v. Parker*, 3 How. (Miss.) 219; 34 Am. Dec. 78. M., upon whose land was an unguarded slough-well, and C., an adjoining owner, in order to save expense of fencing, mutually agreed that the stock of each in the fall of the year might pasture upon the land of the other; there was no special stipulation to protect from injury the stock of one while on the land of the other. *Held*, that M. was not liable for the loss of C.'s horse in the slough-well: *McGill v. Compton*, 66 Ill. 327. A's hogs, which lawfully ran at large, were in the habit of sleeping under B's building. While there, the floor broke down, defendant having overloaded it, and killed the hogs. *Held*, that B was not liable: *Christy v. Hughes*, 24 Mo. App. 275. The Alabama code exempts the owner of animals from liability for trespass on uninclosed land, and further provides that one who injures or destroys an animal

¹ *Knott v. Digges*, 6 Har. & J. 230.

⁵ *Brightman v. Grinnell*, 9 Pick.

² *Wilder v. Speer*, 8 Ad. & E. 547; 14.

³ *Bignell v. Clarke*, 5 Hurl. & N. 485.

⁶ *Greencastle v. Martin*, 74 Ind. 449;

⁴ *Adams v. Adams*, 13 Pick. 384.

⁷ 39 Am. Rep. 93.

⁴ *Riker v. Hooper*, 35 Vt. 457; 82 Am. Dec. 646.

⁷ *Collins v. Fox*, 48 Conn. 490.

so trespassing shall be liable in five times its value. The owner of land tied up a horse trespassing on his land, and the horse was found choked to death by the rope. *Held*, that the question of negligence in the manner of tying was only material on the question of whether the horse's death was the proximate consequence of the tying; that if it was, the liability existed: *Wilhite v. Speakman*, 79 Ala. 400. A plaintiff's horses escaped from his inclosure against his will, and he immediately went in search of them to put them up, but before he found them, they were seized by the police constable of the town where they were found running, who impounded them under the ordinance of the town. *Held*, that under such circumstances the horses were not running at large in the legal sense of the term, and that the constable had no right to detain them from the owner: *Kinder v. Gillespie*, 63 Ill. 88. A negligently placed a barrel of fish-brine on a public street. *Held*, liable to the owner of a cow who drank thereof, though the brine was poured into the street by some third person: *Heney v. Dennis*, 93 Ind. 452; 47 Am. Rep. 378.

§ 1380. Rights and Liabilities of Finders of Animals.

—A finder of a stray animal has no right to use him.¹ One who finds a stray horse and uses it, knowing the owner, is liable for its value if it die while in his hands;² so where, not knowing the owner, he injures the beast.³ The owner of an animal taken up by a person knowing the ownership may replevy him without tendering the costs and expenses. The animal is not an "estrays."⁴

¹ *Weber v. Hartman*, 7 Col. 13, 49 Am. Rep. 339, the court saying: "The argument that the continuous working of estray horses in livery, as in this case, may be justified on the ground of necessity, assigning as such necessity that the animals require exercise to preserve them from injury, or a necessity to cut down the expenses of keeping them, or to place it upon the ground of a benefit to the owner, as affording better opportunities for recognition, is not only illusory

and absurd, but it is in contravention of legal principles. The law from the earliest times has regarded the using of estrays, or distrained animals, as a tort, save only when the use was necessary to their preservation, as in the case of milk cows."

² *Watts v. Ward*, 1 Or. 86; 62 Am. Dec. 299.

³ *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

⁴ *Walters v. Glats*, 29 Iowa, 437.

CHAPTER LXXIV.

LIABILITIES OF OWNERS OR KEEPERS OF ANIMALS.

- § 1381. Liability of owner or keeper of animal — Agister — Harboring — Joint Owners.
- § 1382. Liability for act of servant — Notice to servant.
- § 1383. Injuries by animals, wild and tame — Distinction.
- § 1384. Injuries by tame animals.
- § 1385. Proof of scienter.
- § 1386. Liability enlarged by statute.
- § 1387. Contributory negligence — Children.
- § 1388. Trespassers — Watch-dogs.
- § 1389. Negligence in driving, securing, or using animals.
- § 1390. Owner transferring care of animals — Bound to notify of vicious propensities.
- § 1391. Liability for trespasses of animals.
- § 1392. Driving cattle on highway.
- § 1393. Keeping diseased animals.
- § 1394. Selling diseased animals.

§ 1381. **Liability of Owner or Keeper of Animal — Agister — Harboring of Animal — Joint Owners.** — The owners or keepers of animals, on the ground that they are under a legal obligation to so control them as to prevent them doing injury, are liable for any injuries which they may inflict.¹ The act of the animal need not be vicious. If it cause damage, it may arise from the animal's playfulness or mischief; as if a dog playfully injure one,² or a young horse, negligently allowed to go loose in the public streets, while running and gamboling and kicking his heels in the air, kicks a pedestrian and injures him.³ So an owner of a hog who has permitted it to run at large has been held liable for damage caused by its appearance at the side of a road, frightening a horse.⁴ He

¹ *Rossell v. Cottom*, 31 Pa. St. 525; *Marsel v. Bowman*, 62 Iowa, 57.

² *Line v. Taylor*, 3 Fost. & F. 731; *Evans v. McDermott*, 49 N. J. L. 163; 60 Am. Rep. 602; or a ram: *Oakes v. Spaulding*, 40 Vt. 347; 94 Am. Dec. 404.

³ *Dickson v. McCoy*, 39 N. Y. 400.

⁴ *Jewett v. Gage*, 55 Me. 538; 92 Am. Dec. 615. And see *Sherman v. Favour*, 1 Allen, 191.

who keeps or harbors an animal about his premises, or permits him to resort there, is liable as an owner, and the plaintiff need not prove that he is really the owner.¹ Where a horse-railroad company was sued for damages caused by the bite of a dog, and it appeared that the dog was kept about the stable by an employee with the knowledge of the superintendent, it was held that the company was properly made liable.² But the owner is liable, though he have not the actual custody at the time; as where a dog is temporarily in the custody of a neighbor, or has been put into the hands of his son by the owner, to avoid his creditors.³ But for a dog which hangs around a house, in spite of being driven away, the housekeeper is not responsible;⁴ nor is an employer liable for a dog which is owned by and follows a hired laborer of his to his work each day.⁵ Where the owner and the keeper are different persons, the latter is the one liable, as the agister of cattle,⁶

¹ *Wilkinson v. Parrott*, 32 Cal. 102; *Barrett v. R. R. Co.*, 3 Allen, 101; *Cummings v. Riley*, 52 N. H. 368; *Marsh v. Jones*, 21 Vt. 378; 52 Am. Dec. 67; *Frammell v. Little*, 16 Ind. 251; *Smith v. Montgomery*, 52 Me. 187; *McKone v. Wood*, 5 Car. & P. 1; *Keenan v. Gutta Rubber Co.*, 46 Hun, 544.

² *Barrett v. R. R. Co.*, 3 Allen, 101, the court saying: "As it would in many cases be difficult to prove that any person had property in the animal, the law holds the person who harbors him responsible for the damage which he may do while in his custody or control. There was evidence at the trial that the dog which inflicted the injury on the plaintiff was kept on the premises of the defendants for several weeks by a person in their employment, who had the charge and superintendence of their stables; and there was also evidence that tended to show that this was done with the knowledge and implied assent of their general agent or superintendent. This was clearly sufficient to warrant the jury in finding that the dog was kept by the defendants. As they could do no act except through their agents, it

was competent to infer that in keeping the dog under the circumstances disclosed by the evidence, their agent was acting in their behalf. It was urged by the counsel for the defendants that they, being a corporation created for a specific purpose, cannot through their officers and agents be made liable as keepers of a dog to the penalty prescribed by the statutes. But it is impossible for us to determine, as a matter of law, that a corporation established for the purpose of building and running a railroad by horse-power would be going *ultra vires* in either owning or keeping a dog. On the contrary, it would seem to come quite within the scope of the power and authority granted to them to keep dogs to protect their stables and property from incendiaries and thieves."

³ *Marsh v. Jones*, 21 Vt. 378; 52 Am. Dec. 67.

⁴ *Smith v. R. R. Co.*, 36 L. J. Com. P. 22; L. R. 2 Com. P. 4.

⁵ *Auchmuty v. Ham*, 1 Denio, 495.

⁶ *Kennett v. Durgin*, 59 N. H. 560; *Rossell v. Cottom*, 31 Pa. St. 525; *Tewksbury v. Bucklin*, 7 N. H. 518; *Ward v. Brown*, 64 Ill. 307; 16 Am.

or the depasturer of sheep.¹ But it has been held in Massachusetts that at common law, a party into whose land agisted cattle escape may maintain an action against either the owner or the agister, at his election.² The lessee of a farm, having care of it and the stock thereon, is as liable for damages by the cattle as if he were the owner.³ The bailee of a vicious dog, knowing him to be vicious, is as much bound to restrain him as the owner.⁴

Joint owners of an animal are liable jointly,⁵ but separate owners of several animals are not jointly liable for injuries done by them all at the same time.⁶ Two joint owners of a vicious animal are each bound to restrain him. If he is not restrained, and one owner is sued and compelled to pay damages for an injury done by him, such owner cannot enforce a claim for contribution against the co-owner. The case is within the rule that there is no right of contribution between wrong-doers.⁷ One member of a firm may be sued as the keeper of a dog owned and kept by the firm, under the Maine statute.⁸ Under the Vermont statute, the owner of a dog may be held liable for all the damage done to a flock of sheep by a pack of dogs, of which his dog was one.⁹

The identity of an animal was allowed to be proved by

Rep. 561; *Cook v. Morea*, 33 Ind. 497; *Lyons v. Merrick*, 105 Mass. 71; *Wales v. Ford*, 8 N. J. L. 267; *Weymouth v. Gile*, 72 Me. 446. But the owner would be liable if he selected a reckless or irresponsible agister or bailee: *Ward v. Brown*, 64 Ill. 307; 16 Am. Rep. 561.

¹ *Barnum v. Van Dusen*, 16 Conn. 200.

² *Sheridan v. Bean*, 8 Met. 284; 41 Am. Dec. 507.

³ *Moulton v. Moore*, 56 Vt. 700.

⁴ *Marsel v. Bowman*, 62 Iowa, 57.

⁵ *Smith v. Jaques*, 6 Conn. 530; *Oakes v. Spaulding*, 40 Vt. 347; 94 Am. Dec. 404; *Spalding v. Oakes*, 42 Vt. 343. See *Buddington v. Shearer*, 20 Pick. 477; 22 Pick. 427.

⁶ *Van Steenberg v. Tobias*, 17 Wend. 562; 31 Am. Dec. 310; *Russell v.*

Tomlinson, 2 Conn. 206; *Carroll v. Weiler*, 1 Hun. 605; *Auchmuty v. Ham*, 1 Denio, 495; *Westgate v. Carr*, 43 Ill. 450; *Buddington v. Shearer*, 20 Pick. 477; 22 Pick. 427; *Partenheimer v. Van Order*, 20 Barb. 479; *Adams v. Hall*, 2 Vt. 9; 19 Am. Dec. 690; *Denny v. Carroll*, 9 Ind. 72; *Yeazel v. Alexander*, 58 Ill. 263; *Little Schuylkill Nav. Co. v. Richards*, 57 Pa. St. 147; 98 Am. Dec. 209; *Slater v. Mersereau*, 64 N. Y. 147; *Chipman v. Palmer*, 9 Hun. 520; *Cogswell v. Murphy*, 46 Iowa, 44. Unless the separate owners have a joint control: *Ozburn v. Adams*, 70 Ill. 291. And under a statute: *Kerr v. O'Connor*, 63 Pa. St. 341.

⁷ *Spalding v. Oakes*, 42 Vt. 343.

⁸ *Grant v. Ricker*, 74 Me. 487.

⁹ *Remele v. Donahue*, 54 Vt. 555.

the opinion of a witness who heard the dog bark, and recognized it;¹ in another, by proof that it had been seen in company, at another time, of another dog, which was proved to have been engaged in the sheep-killing, the subject of the action.² In a New York case, where two dogs of different sizes killed sheep in the dark, it was held that the jury rightly determined, in the absence of direct proof, that the biggest dog killed the most sheep.³

ILLUSTRATIONS. — The toll-taker at a bridge keeps a vicious dog, which injures a person. He sues the owner of the bridge for damages. *Held*, that, it appearing that he did not authorize the dog to be kept, and that a dog was not necessary for the conduct or protection of the bridge, he was not liable: *Baker v. Kinsey*, 38 Cal. 631; 99 Am. Dec. 438. A city permitted, upon a public square, the erection of a booth for the exhibition of a "sacred ox." While the ox was being exercised upon the highway, he frightened a horse, whose owner thereby sustained injury. *Held*, that the city was not liable for the injury: *Cole v. Newburyport*, 129 Mass. 594; 37 Am. Rep. 394. A dog, owned by and licensed in the name of a superintendent of a poor-farm of a city, is kept at the farm with the knowledge of one of the overseers of the poor of the city, and, without objection by him, is fed with food furnished by the city for use at the farm, and during a portion of the time is allowed the run of the farm. *Held*, not to show that the city is a "keeper" of the dog: *Collingill v. Haverhill*, 128 Mass. 218. B being the joint owner of a ram, and knowing of its butting propensities, took it, of his own accord, without permission of or consultation with A, the other joint owner, and in A's absence, and put it into B's pasture, where the injury was done; A not having given any directions as to restraining the ram, and not interesting himself about it, although he knew of its propensity and habit of doing violence to persons. *Held*, that he was liable equally with B for injuries caused by the ram's butting, though he had not been consulted as to the keeping, care, and management of it: *Oakes v. Spaulding*, 40 Vt. 347; 94 Am. Dec. 404.

§ 1382. **Liability for Act of Servant.** — A man is liable for the negligent care or use of animals by his servant, whereby an injury happens,⁴ provided the servant is act-

¹ *Wilbur v. Hubbard*, 35 Barb. 303.

⁴ *Michael v. Alestree*, 2 Lev. 172;

² *Carroll v. Weiler*, 1 Hun. 605.

Frazer v. Kimler, 5 Thomp. & C.

³ *Wilbur v. Hubbard*, 35 Barb. 303. 16.

ing at the time within the scope of his employment. If he is acting at the time outside of the authority given him, the master is not liable.¹ And in any event, negligence either in the master or the servant must be shown.² And the relation of master and servant must be established.³

ILLUSTRATIONS. — A's horse runs away and injures B. A's servant was negligent in not properly securing and restraining the horse. A is liable: *Hummell v. Webster*, Bright. N. P. 133; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Streett v. Laumier*, 34 Mo. 469. A hostler at an inn omits to put the bits in the mouth of a guest's horse, whereby it becomes unmanageable and damages the buggy of a third person. The innkeeper is liable: *Hall v. Warner*, 60 Barb. 198. A's servant willfully sets A's dog upon the cattle of B. A is not liable to B: *Steele v. Smith*, 3 E. D. Smith, 321. A daughter sets her father's dogs upon A's hog, which is bitten and killed. The father is not responsible to A: *Tift v. Tift*, 4 Denio, 175.

§ 1383. **Injuries by Animals, Wild and Tame—Distinction.**—As we have seen,⁴ the law—with reference to the rights of property which may be acquired in them—divides animals into two classes,—animals *feræ naturæ*, and animals *mansuetæ naturæ*, i. e., wild animals and tame animals. This distinction is maintained also in considering the liabilities of the owners of animals for injuries done by them. It is stated in a leading case in these words: "It is a well-settled principle that in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the dec-

¹ *McManus v. Crickett*, 1 East, 106; *Middleton v. Fowler*, 1 Salk. 282; *Steele v. Smith*, 3 E. D. Smith, 321; *Weldon v. R. R. Co.*, 5 Bosw. 576; *Cohen v. R. R. Co.*, 69 N. Y. 170.

² *Sullivan v. Scripture*, 3 Allen, 564.

³ *Milligan v. Wedge*, 12 Ad. & E. 737.

⁴ *Ante*, §§ 1365 et seq.

laration; but as to animals *feræ naturæ*, such as lions, tigers, or the like, the person who keeps them is liable for any damage they may do without notice, on the ground that by nature such animals are fierce and dangerous.”¹ From this extract, it will be seen that the distinction is not drawn exactly at the division line between wild and tame animals. It speaks of animals *feræ naturæ*; such as lions, tigers, or the like. This, then, should be borne in mind,—for the reason that in some cases the language of the courts has been loose,—viz., that when an animal belongs to the class *feræ naturæ*, the owner is not always liable at all events; and when an animal belongs to the class *mansuetæ naturæ*, the owner may be liable without evidence of notice of its mischievous disposition. The correct rule is given by Judge Thompson² thus: “Where mischief is done or injuries inflicted by animals whose generic propensities or habits are neither mischievous nor dangerous, in order to charge the owner for damages done by such animals it is necessary to allege and prove that such owner knew or had notice that the animals were accustomed to such or similar mischief, or, to speak technically, the *scienter* must be alleged and proved. In such case, actual negligence must be shown.”³ But if the mischief done is in accordance with the generic propensities of the animal committing it, *scienter* need not be alleged and proved, but the owner is presumed negligent. An exception to this general rule of common law is found in the case of the escaping of that smaller class of animals which are not usually tamed, such as rabbits, pigeons, etc., from the land of one to that of another. No action could, in general, be supported for damage done by them, because the instant they escaped from the land of the owner his

¹ Van Leuven v. Lyke, 1 N. Y. 515; Stumps v. Kelley, 22 Ill. 140; Wormley v. Gregg, 65 Ill. 251; Buxendin v. Sharp, 2 Salk. 662.

² Thompson on Negligence, 201.

³ Vrooman v. Lawyer, 13 Johns. 339;

property in them ceased.”¹ That the keeper of a savage animal, such as a lion, tiger, bear, wolf, etc., is an insurer against injuries which it may commit; that he is bound to keep it so confined that it may be safe, and that the keeping of such an animal, knowing its vicious disposition, is the gist of the action, is a principle well settled by the authorities,² though occasionally criticised and condemned by writers and judges.³

¹ *Hinsley v. Wilkinson*, Cro. Car. 387; *Cooper v. Marshall*, 1 Burr. 259; *Bowlston v. Hardy*, Cro. Eliz. 547; 5 Coke, 105.

² *Smith v. Cook*, 1 Q. B. Div. 79; *May v. Burdett*, 9 Q. B. 101; *McCaskill v. Elliott*, 5 Strob. 198; 53 Am. Dec. 706; *Kelly v. Tilton*, 3 Keyes, 263; *Partlow v. Haggerty*, 35 Ind. 178; *Koney v. Ward*, 2 Daly, 295; *Oakes v. Spaulding*, 40 Vt. 351; 94 Am. Dec. 494; *Merbus v. Dodge*, 38 Wis. 300; *Congress Spring Co. v. Edgar*, 99 U. S. 645; *Scribner v. Kelley*, 38 Barb. 14; *Bezotti v. Harris*, 1 Fost. & F. 92; *Glidden v. Moore*, 14 Neb. 84; 45 Am. Rep. 98. In *Congress Spring Co. v. Edgar*, 99 U. S. 645, one of the latest decisions on this subject, Mr. Justice Clifford said: “Three or more classes of cases exist in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others, the required allegations and proofs varying in each case: 2 Bla. Com., per Cooley, 390. Owners of wild beasts, or beasts that are in their nature vicious, are liable under all, or most all, circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large. Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *feræ naturæ*, the owner is liable to an action of damage if it get loose and do harm: 1 Hale P. C. 430; *Worth v. Gilling*, L. R. 2 Com. P. 3. Owners are liable for the hurt done by the animal even without notice of the propen-

sity, if the animal is naturally mischievous, but if it is of a tame nature, there must be notice of the vicious habit: *Mason v. Keeling*, 12 Mod. 332; *Rex v. Huggins*, 2 Ld. Raym. 1574. Damage may be done by a domestic animal kept for use or convenience; but the rule is, that the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief: *Vrooman v. Lawyer*, 13 Johns. 339; *Buxendin v. Sharp*, 2 Salk. 662; *Cockerham v. Nixon*, 11 Ired. 269. Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensity: *Jackson v. Smithson*, 15 Mees. & W. 563; *Van Leuven v. Lyke*, 1 N. Y. 515; 49 Am. Dec. 346; *Card v. Case*, 5 Com. B. 632; *Hudson v. Roberts*, 6 Ex. 697; *May v. Burdett*, 9 Q. B. 100; *Dearth v. Baker*, 22 Wis. 73; *Cox v. Burbridge*, 13 Com. B., N. S., 430.”

³ Thus, Judge Cooley says: “The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country, with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them, and the idea of legal wrong in keeping them and exhibiting them is never indulged. It seems,

ILLUSTRATIONS.—A person kept a monkey in a cage. The monkey escaped, and bit and injured B's wife. *Held*, that A was liable, without regard to the question whether or not he had been negligent in keeping and confining the monkey: *May v. Burdett*, 9 Q. B. 101. A deer is kept in an inclosure in which there is a mineral spring resorted to by the guests of a hotel. A guest is attacked and injured by the deer. *Held*, that its owner is liable, without regard to whether he was negligent or not in securing it: *Congress Spring Co. v. Edgar*, 99 U. S. 645; and see *Marble v. Ross*, 124 Mass. 44 (case of a stag). Defendants, members of an unincorporated club, kept a bear chained upon their premises, in the city of New Orleans. A pastured his cattle in a field adjoining; and, one day, while A and his hired boy were passing the bear, the boy—not in A's presence, however—teased the bear by setting a dog on him. The bear slipped his collar, and attacked and wounded A, who died of his injuries. *Held*, that defendants were liable, including a defendant who, being away at the time, knew nothing of the bear: *Vredenburg v. Behan*, 33 La. Ann. 627.

§ 1384. **Injuries by Tame Animals.**—Therefore, a tame animal which is, nevertheless of a fierce and savage disposition, stands in the same position as a wild animal, naturally ferocious;¹ so the owner of an ordinary domestic animal keeps him at his peril when he learns or has reason to believe that he has an inclination to bite or attack individuals.² "He is liable to any person who,

therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries for which a civil action will not lie": Cooley on Torts, 349. In a dissenting opinion in *Laverone v. Mangianti*, 41 Cal. 140, Crockett, J., while admitting the reasonableness of the rule of the common law when applied to wild beasts, contends that it should not be applied to animals not *feræ naturæ*, but still ferocious; e. g., a fierce and savage dog.

¹ *Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; *Koney v.*

Ward, 2 Daly, 295; *Stumps v. Kelley*, 22 Ill. 140; *Kelly v. Tilton*, 3 Keyes, 263; *Kittredge v. Elliott*, 16 N. H. 77; 41 Am. Dec. 717; *Earhart v. Youngblood*, 27 Pa. St. 331; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600; *Godeau v. Blood*, 52 Vt. 251; 36 Am. Rep. 751; *Partlow v. Haggarty*, 35 Ind. 178; *Keightlinger v. Eagan*, 65 Ill. 235; *Muller v. McKesson*, 73 N. Y. 195; 29 Am. Rep. 123; *Perkins v. Mossman*, 44 N. J. L. 579.

² *Smith v. Causey*, 22 Ala. 568; *Dearth v. Baker*, 22 Wis. 73; *Earl v. Van Alstine*, 8 Barb. 630; *Popplewell v. Pierce*, 10 Cush. 509; *Buckley v. Leonard*, 4 Denio, 500; *Arnold v. Norton*, 25 Conn. 92; *Fairchild v. Bentley*, 30 Barb. 147; *Shirley v. Bartley*, 4 Sneed, 58; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6; *Lynch v. McNally*, 73 N. Y. 347; *Muller v. Mc-*

without contributory negligence on his part, is injured by such animal, and he cannot exonerate himself by showing that he used care in keeping and restraining the animal. He takes the risk of being able to keep him safely, so that he shall not injure others. The owner's negligence is in keeping the animal, knowing that it is dangerous."¹ The declaration must aver the *scienter*.² A person who keeps a dog which he knows to be savage and ferocious keeps him at his peril, and is responsible for any hurt he may do.³ Without notice of its mischievous inclinations, the owner of a domestic animal is not liable for what it does.⁴ A dog kept on a farm is presumed

Kesson, 73 N. Y. 195; 29 Am. Rep. 123; McCaskill v. Elliott, 5 Strob. 196; 53 Am. Dec. 706; Woolf v. Chalkler, 31 Conn. 121; 81 Am. Dec. 175; Wheeler v. Brant, 23 Barb. 324; Coggswell v. Baldwin, 15 Vt. 404; 11 Am. Dec. 686. In a New York case it is said that where the action is to recover damages for injuries to plaintiff's dog, inflicted by defendant's dog, whatever may have been the character and habits of defendant's dog, it is necessary for plaintiff to prove that he was the aggressor, or in the wrong in that particular fight. If plaintiff's dog provoked the quarrel, and caused the fight, defendant, as owner of the other dog, cannot be made responsible for the consequences. The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another: Wiley v. Slater, 22 Barb. 506.

¹ Marble v. Ross, 124 Mass. 44.

² Murphy v. Preston, 5 Mackay, 514.

³ Laverone v. Mangianti, 41 Cal. 138; 10 Am. Rep. 269; Hinckley v. Emerson, 4 Cow. 351; 15 Am. Dec. 333; Brice v. Bauer, 108 N. Y. 428; 2 Am. St. Rep. 454. And the propensity need not have been a propensity to bite in anger: Evans v. McDermott, 49 N. J. L. 163; 60 Am. Rep. 602.

⁴ Vrooman v. Lawyer, 13 Johns. 339; Le Forest v. Tolman, 117 Mass. 109; 19 Am. Rep. 400; Van Leuven v. Lyke, 1 N. Y. 515; 49 Am. Dec. 346; Dearth

v. Baker, 22 Wis. 73; Kertschacke v. Ludwig, 28 Wis. 430; Slinger v. Henneinan, 38 Wis. 504; Fairchild v. Bentley, 30 Barb. 147; Hinckley v. Emerson, 4 Cow. 351; Soames v. Barnardiston, 1 Freem. 430; Durden v. Barnett, 7 Ala. 169; Earl v. Van Alstine, 8 Barb. 630; Smith v. Causey, 22 Ala. 568; Wormley v. Gregg, 65 Ill. 251; Murray v. Young, 12 Bush, 337; Moss v. Pardridge, 9 Ill. App. 490. In Earl v. Van Alstine, 8 Barb. 630, it was held that the owner of bees in hives near a road which had stung the plaintiff's horses while he was driving past was not liable, without proof of notice to the owner, either from the nature of the bees or their previous habits, that it was dangerous to keep them where he did. "Having shown, then, clearly," said Selden, J., "that the liability does not depend upon the classification of the animal doing the injury, but upon its propensity to do mischief, it remains to be considered whether bees are animals of so ferocious a disposition that every one who keeps them, under any circumstances, does so at his peril. If it is necessary for the plaintiff to aver and prove the mischievous nature of the animal, nothing of the kind was done in this case; but if courts are to take judicial notice of the nature of things so familiar to man as bees, which I suppose they would be justified in doing, then I would observe that, however it may have been anciently, in modern days the bee has become

not to be vicious or to have dangerous habits, and the owner or harbinger is not liable for his vicious acts, unless he had knowledge of them.¹

ILLUSTRATIONS. — A was riding in a buggy past B's house, in the highway, leading two colts by halter behind the buggy. A third colt was following loose behind them. The colts were two years old, had been halter-broken, and were gentle. B's dog came running out into the highway, and barked and attacked the colts, frightening them, and causing them to jump against the buggy, one of them jumping upon A and throwing him out of and under the buggy, and seriously injuring him. *Held*, that B was liable if he knew, or had cause to believe, that his dog was vicious, and in the habit of attacking teams or passersby in the highway: *Knowles v. Mulder*, Mich., 1889. In an action against the owner of a dog, who had bitten plaintiff, the evidence failed to show that the dog had ever before bitten or threatened to bite any one. The testimony was, that the dog was a setter, and of kind disposition, and not given to bite, either in malice or mischief, and had never been complained of by any person; and that he was played with, harnessed, and ridden by children. *Held*, that defendant was not liable: *Staetler v. McArthur*, 33 Mo. App. 218. A's dog runs into B's yard and kills B's dog. *Held*, that A is not liable for the damage resulting from the death of the dog: *Buck v. Moore*, 35 Hun, 338. A declaration avers that A kept a horse which he knew

almost as completely domesticated as the ox or the cow. Its habits and its instincts have been studied, and through the knowledge thus acquired it can be controlled and managed with nearly as much certainty as any of the domestic animals; and although it may be proper still to class it among those *feræ naturæ*, it must, nevertheless, be regarded as coming very near the dividing line; and, in regard to its propensity to mischief, I apprehend such a thing as a serious injury to persons or property from its attacks is very rare, not occurring in a ratio more frequent, certainly, than injuries arising from the kick of a horse or the bite of a dog. There is one rule to be extracted from the authorities to which I have referred, not yet noticed, and that is, that the law looks with more favor upon the keeping of animals that are useful to man than such as are purely noxious and useless. And the keeping of the one, although in some

rare instances it may do injury, will be tolerated and encouraged, while there is nothing to excuse the keeping of the other. In the case of *Vrooman v. Lawyer*, 13 Johns. 339, the court say: 'If damages be done by any domestic animal kept for use or convenience, the owner is not liable to an action without notice.' The utility of bees no one will question, and hence there is nothing to call for the application of a very stringent rule to the case. Upon the whole, therefore, I am clearly of the opinion that the owner of bees is not liable, at all events, for any accidental injury they may do." And under the Massachusetts statute rendering the owner of a dog "liable to any person injured by it," it is immaterial whether the injury was by biting or jumping on plaintiff, or whether in play or with vicious intent: *Hathaway v. Tinkham*, 148 Mass. 85.

¹ *Shaw v. Craft*, 37 Fed. Rep. 317.

was accustomed to bite mankind, which bit and injured B. *Held*, that an averment was not necessary that the injury was received through A's negligence in keeping the horse: *Popplewell v. Pierce*, 10 Cush. 509. B's race-horse, in charge of the servant of a man in whose charge B had placed the horse, ran away, and came into collision with A's horse. *Held*, that as A's allegations of the vicious and mischievous propensities of B's horse were not proven, plaintiff could not recover: *Bell v. Leslie*, 24 Mo. App. 661. Plaintiff, while walking in the street in front of the defendant's house, on a dark night, was bitten by the defendant's dog, lying there unmuzzled. There was an ordinance prohibiting the running of unmuzzled dogs at large in the street. *Held*, that the defendant was not liable without proof of the *scienter*: *Smith v. Donohue*, 49 N. J. L. 548; 60 Am. Rep. 652. A induced B to assist him in hitching his horse to a wagon by falsely stating that the horse was gentle. The court charged that if A represented the horse to be gentle, and thus induced B to take hold of him, and if the horse was not gentle, and if B was injured without negligence on his part, then A was responsible for the injuries sustained by the vice of the horse. *Held*, error, in making A liable without reference to his knowledge of the viciousness of the horse, or to the intent with which the representation was made, and also as assuming that the horse was vicious: *Finney v. Curtis*, 78 Cal. 498.

§ 1385. Proof of Scienter. — Knowledge by the owner of the fierce or mischievous disposition of a domestic animal, or one ordinarily harmless, is proved by showing one or more previous instances of the animal attacking men or animals which the owner had notice of.¹ But the

¹ *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Woolf v. Chalker*, 31 Conn. 131; 81 Am. Dec. 175; *Arnold v. Norton*, 25 Conn. 92; *Kittridge v. Eliott*, 16 N. H. 77; 41 Am. Dec. 717; *Buckley v. Leonard*, 4 Denio, 500; *Coggsell v. Baldwin*, 15 Vt. 404; 11 Am. Dec. 686; *Pickering v. Orange*, 2 Ill. 492; 32 Am. Dec. 35; *Cockerham v. Nixon*, 11 Ired. 269; *Wheeler v. Brant*, 23 Barb. 324; *Sarch v. Blackburn*, 4 Car. & P. 297. Proof of a subsequent instance will not do: *Thomas v. Morgan*, 5 Tyrw. 1085; *Fairchild v. Bentley*, 30 Barb. 147; *Cooke v. Waring*, 2 Hurl. & C. 332. In *Mann v. Weiland*, 81½ Pa. St. 243, the owner of

a dog was sued for an injury to another's horses. "To fasten a liability on him," said the court, "it was necessary to establish the vicious character of his dogs, and his previous knowledge of that character. To prove the former, the defendant in error gave evidence of the conduct of the dogs on two occasions. At one time, as a team was passing along on the public highway, the dogs, without leaving the inclosure of their master, jumped against the bars of the fence at the roadside with such force and violence, and rattled them to such an extent as to frighten the horses, thereby causing them to spring, break the

owner need not know that the animal bites or attacks people; it is enough that he knows that it is savage.¹

doubletree, and run for several rods. The other act was of a more vicious character. As a team was passing the premises of the plaintiff in error, his dogs ran out into the road; one of them barked and jumped ahead of the horse so as to stop it; the other raised himself up, put his paws on the wagon, barked and growled, and seized the shawl of a small girl, who sat on the back seat; on its being jerked loose from him, he got down, but both dogs, growling, followed the team some three or four hundred rods. There was evidence that the plaintiff in error had notice, before the injury in this case, of the conduct of the dogs on both these occasions. Were these facts sufficient to submit to the jury to find the dogs to be vicious and accustomed to attack and frighten horses? In *Smith v. Pelah*, 2 Strange, 1264, it was said by Lee, C. J.: 'If a dog has once bit a man, and the owner, having notice thereof, keeps the dog and lets him go about, or lie at his door, an action will lie against him at the suit of the person who is bit, though it happened by such person treading on the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterward to be endangered.' So in *Arnold v. Norton*, 25 Conn. 92, it was held that full and satisfactory proof of a single instance in which the dog had previously bitten a human being, and of the owner's knowledge thereof, was sufficient, but that the force of such testimony would depend much on the surrounding circumstances. In *Kittridge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717, evidence of notice of one attack by a dog was held sufficient to charge the owner with all its subsequent acts. In *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306, one instance seems to have been considered sufficient. One attempt of a bull to gore was held sufficient in *Cock-erham v. Nixon*, 11 Ired. 269. We think one instance may show such unmistakable evidence of a vicious propensity as to make the owner of the dog, with notice, liable for any

subsequent act of a similar character." In an action against the owner of a vicious dog to recover for injuries to the plaintiff's team running away in consequence of an attack by the dog in the street, the *scienter* must be alleged and proved, and it should clearly appear that the onset of the dog, and not any vicious habit of the horse, was the cause of the runaway: *Wormley v. Gregg*, 65 Ill. 251. A dog may be found to have attacked a horse upon a highway, although the dog did not leave his master's premises, nor go within fifteen feet of the horse, nor bark or make any noise: *Denison v. Lincoln*, 131 Mass. 236.

¹ *Simson v. London Omnibus Co.*, L. R. 8 Com. P. 390; *Hudson v. Roberts*, 6 Ex. 697; *Partlow v. Haggarty*, 35 Ind. 170; *Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; *Worth v. Gilling*, L. R. 2 Com. P. 1; *Flansburg v. Basin*, 3 Ill. App. 531; or that it is dangerous, in that it has been bitten by a mad dog: *Jones v. Perry*, 2 Esp. 482. In *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600, it is said: "There was evidence tending to prove that the dogs were vicious. One of them was kept chained a portion of the time; one of the defendants warned a party to beware of them, saying one of them was very ugly. It was shown that they ran out furiously at passers-by, indicating a disposition to inflict an injury upon them, and were occasionally called in by persons in the defendant's employ. This, considered with other evidence in the case, tended to show that their vice was known to the defendants, who had caused a sign to be erected on their premises, not in sight of the place where the plaintiff was passing, inscribed, 'Beware of dogs'; and the other defendant, when apprised of the injury inflicted by them upon the plaintiff, after expressing his regret, said, 'They were large dogs, and he must have had a serious time.' Whether the dogs were vicious to an extent that endangered life or limb, and were prone to attack persons, and that the defendants had knowledge of that propensity, were questions

"The formula used in text-books and in forms given for pleadings in such cases 'accustomed to bite' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But as he is held to be a man of common vigilance and care, if he had good reason to believe from his knowledge of the ferocious nature and propensity of the dog that there was ground to apprehend that he would under some circumstances bite a person, then the duty of restraint attached, and to omit it was negligence."¹

In an action against the owner of a dog for biting a man, proof that the owner knew that he had a propensity to bite animals is not enough;² nor that he might have known the dog's vicious disposition with reasonable care;³ nor that the dog had a propensity to chase trespassing cattle from his master's grounds.⁴ But it is enough that he had destroyed animals of another species,⁵ or had attacked a man.⁶ Proof that the defendant had warned a person to beware of the dog, lest he should be bitten, is evidence to go to a jury of the *scienter*.⁷ Where the owner knows his dog has bitten people, it is no defense that he was generally inoffensive.⁸ If a dog is kept for protection

fairly raised by the evidence, and were properly submitted to the jury. But it is, in substance, insisted that even though the plaintiff was not intentionally a wrong-doer by being upon the defendants' premises, and that they were aware that their dogs had such vicious propensity, they, nevertheless, are not liable for the injury inflicted, for the reason that it was not shown that either of the dogs had ever before that time bitten any one; in other words, that however much the life or limb of innocent persons might, to the knowledge of the defendants, have been exposed to danger by the vicious propensity of their dogs, they are not liable for this, being the first injury inflicted, notwithstanding they had just reason to believe that such injury would, under

like circumstances, occur. The law has gone far to shield those who have kept dogs for the protection of their property from the consequences of injuries to persons inflicted by them, but not so far as to protect the keepers of such as are known to them to be ferocious to a degree that endangers the safety of such as are unwarned, and innocently upon their premises, from the consequences of wounds inflicted by them."

¹ Godeau v. Blood, 52 Vt. 251; 36 Am. Rep. 751.

² Keightlinger v. Egan, 65 Ill. 235.

³ Laherty v. Hogan, 13 Daly, 533.

⁴ Spray v. Ammerman, 66 Ill. 309.

⁵ Pickering v. Orange, 2 Ill. 338.

⁶ Cockerham v. Nixon, 11 Ired. 269.

⁷ Judge v. Cox, 1 Stark. 285.

⁸ Buckley v. Leonard, 4 Denio, 500.

to premises, the purpose for which he is kept charges his master with knowledge that he is of fierce and dangerous character.¹ In an English case it is said that in an action for knowingly keeping a fierce and mischievous dog, which had bitten or wounded the plaintiff, it is necessary to prove that he has injured the plaintiff, and is used to injuring people, and a mere habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial accidental damage to clothes, would not sustain the action; and the dog may be brought into court, and shown to the jury to assist them in judging of his temper and disposition.² Knowledge of an agent or servant of the vicious quality of an animal is the knowledge of the owner, and binds him,³ provided the agent is one whose duty, in the course of his employment, is to receive such knowledge and communicate it to his principal.⁴

ILLUSTRATIONS.—A had large watch-dogs which he kept chained during the day, and loose at night. B, while passing along the street at night, was attacked and bitten by them. *Held*, that further proof of *scienter* was not necessary: *Montgomery v. Koester*, 35 La. Ann. 1091; 48 Am. Rep. 253. Defendant was accustomed personally to tie his watch-dogs by day, and loose them at night. Having overslept one morning, and neglected to tie the dogs, they bit the plaintiff, who came lawfully on the premises by the invitation of defendant's daughter. *Held*, that defendant's knowledge of the dangerous character of the dogs might be inferred from his habit of tying them by day, but not from his wife's asking the daughter why she had not tied them: *Goode v. Martin*, 57 Md. 606; 40 Am. Rep. 448. Plaintiff, whilst walking along the public street, wearing a red handkerchief, was attacked and injured by a bull, which was being driven along the street. The defendant stated after the accident that the red handkerchief was the cause of the injury, for he knew the bull would run at anything red. He also

¹ *Brice v. Bauer*, 108 N. Y. 428; 2 Am. St. Rep. 454.

² *Line v. Taylor*, 3 Fost. & F. 731.

³ *Baldwin v. Casella*, L. R. 7 Ex. 325; *Gladman v. Johnson*, 36 L. J. Com. P. 153; *Miller v. Kimbray*, 16 L. T., N. S., 360; *Applebee v. Percy*,

L. R. 9 Com. P. 647; *Corliss v. Smith*, 53 Vt. 532. And see *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476.

⁴ *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. Q. B. 310; *Twigg v. Ryland*, 62 Md. 380; 50 Am. Rep. 223.

stated on another occasion that he knew that a bull would run at anything red. *Held*, that this was evidence for the jury in support of the averment of the *scienter*: *Hudson v. Roberts*, 6 Ex. 679; 20 L. J. Ex. 299. Defendant's dog was under his wagon in the shed of an inn, where the defendant was a guest, and bit the plaintiff, the innkeeper, while he was unhitching the horses to move them. *Held*, that whether the dog was or was not, *quoad* the master who had tried to send him home, an involuntary trespasser, the defendant was not liable unless he knew that the dog was of vicious character, and that such knowledge could not be inferred from the subsequent conduct of the dog: *Fairchild v. Bentley*, 30 Barb. 147. To establish the *scienter*, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew. *Held*, that there was evidence of the husband's knowledge of the dog's propensity to bite: *Gladman v. Johnson*, 36 L. J. Com. P. 153; 15 Week. Rep. 313; 15 L. T., N. S., 476. To fix a defendant with knowledge of the ferocious nature of a dog of which he was the owner, and which had bitten the plaintiff, two persons who had upon previous occasions (one of them twice) been attacked by it were called to prove that they had gone to the defendant's public house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. There was, however, no evidence that these complaints were communicated to the defendant; nor was it shown that either of the two men spoken to had the general management of the defendant's business or had the care of the dog. *Held*, that there was evidence of *scienter* to go to the jury: *Applebee v. Percy*, L. R. 9 Com. P. 647; 22 Week. Rep. 704.

§ 1386. **Liability Enlarged by Statute.**—In some states statutes have been passed¹ enlarging the common-law liability of the owners of dogs, and rendering it no longer necessary to prove that the owner knew of the dangerous habits of his dog;² also, giving double damages for such

¹ Massachusetts: Rev. Stats., c. 58, sec. 13; New Hampshire statute; Pennsylvania statute; Michigan statute; Ohio statute; New York: 1 Rev. Stats., p. 656, sec. 9; usually in actions for the killing of sheep by dogs.

² See *Pressey v. Wirth*, 3 Allen, 191; *Orne v. Roberts*, 51 N. H. 110; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175; *Fish v. Skut*, 21 Barb. 333; *Osin cup v. Nichols*, 49 Barb. 145; *Kerr v. O'Connor*, 63 Pa. St. 341; *Swift v. Ap-*

injuries.¹ The New York statute making the owner of a dog which shall "kill" or "wound" a sheep liable, without notice that he was mischievous, has no application where the sheep were only chased and worried. In that case there must be proof of the *scienter* to render the owner liable.² The remedy given by the Massachusetts statute to "any person injured" by a dog against its owner or keeper includes injuries to property.³ The owner or keeper of a dog is liable under the statute of Wisconsin for injuries to the clothes of one bitten, as well as for injuries to his person, although knowledge of the mischievous disposition of the dog is not proved to have been had by the owner. The language of the statute, being general, is not to be limited to injuries to the party only.⁴ Evidence of the owner's knowledge of the dog's character and previous attacks is competent in aggravation of damages, even under a statute which does not make the liability dependent upon such knowledge.⁵ The New Hampshire act entitled, "An act in relation to damages occasioned by dogs," is unconstitutional so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen of the town, without an opportunity to be heard, on the ground, among others, that it is in violation of the right of trial by jury.⁶

§ 1387. **Contributory Negligence—Children.**—Contributory negligence in such cases, as in all other actions for personal injuries, is a bar.⁷ But to show this, it must

plebone, 23 Mich. 252; Gries v. Zeck, 24 Ohio St. 329. Such statutes are constitutional: East Kingston v. Towle, 48 N. H. 57; 97 Am. Dec. 575.

¹ Mitchell v. Clapp, 12 Cush. 278; Smith v. Causey, 22 Ala. 568. Under the Michigan statute, double damages are recoverable for the killing of sheep by a dog, even if the owner is ignorant of his vicious nature: Trompen v. Verhage, 54 Mich. 304.

² Auchmuty v. Ham, 1 Denio, 495.

³ Brewer v. Crosby, 11 Gray, 29.

⁴ Schaller v. Connors, 57 Wis. 321.

⁵ Swift v. Applebone, 23 Mich. 252.

⁶ East Kingston v. Towle, 48 N. H. 57; 97 Am. Dec. 575.

⁷ Marble v. Ross, 124 Mass. 44; Earhart v. Youngblood, 27 Pa. St. 331; Fanning v. Hagadom, 9 Week. Dig. N. Y. 36; Williams v. Moray, 74 Ind. 25; 39 Am. Rep. 76; Eberhart v. Reister, 96 Ind. 478, holding that the complaint must allege that the plaintiff was not negligent. An action cannot be maintained for damages.

be established that the person injured did some act from which it may be inferred that he brought the injury upon himself. If a person should thrust his arm into a bear's mouth and be bitten, it could not be said that the injury was caused by keeping the bear; and so if a person, knowing the vicious propensities of a dog, should wantonly or willfully do an act to induce the dog to bite, or should unnecessarily or voluntarily put himself in the way of the dog, knowing the probable consequences, the same principles would apply.¹ If a person provoke a dog to bite him, he cannot recover.² But ordinary familiarities with a dog loose are not contributory negligence within this rule. "They are not acts from which any bad consequences would naturally follow; certainly not from a peaceful dog, which it may be presumed every dog at large is."³ In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow.⁴ The plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution.⁵ The owner is not excused in such case, although the person committed a technical trespass in entering the premises, and although he has kept the dog within an inclosure,

caused by the escape of a bull from his pasture, if the fence was reasonably secure, especially when the bull's escape was chiefly or wholly owing to the fault of the owner of the property injured, or his agent: *Weide v. Thiel*, 9 Ill. App. 223.

¹ *Lynch v. McNally*, 73 N. Y. 347; *Muller v. McKesson*, 73 N. Y. 195; 29 Am. Rep. 123; *Sheehan v. Cornwall*, 29 Iowa, 99. Accidentally step-

ping on a dog's toes is not contributory negligence: *Smith v. Pelah*, 2 Strange, 1264; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175.

² *Keightlinger v. Egan*, 65 Ill. 235; *Quimby v. Woodbury*, 63 N. H. 370.

³ *Lynch v. McNally*, 73 N. Y. 347.

⁴ *Blackman v. Simmons*, 3 Car. & P. 138.

⁵ *Curtis v. Mills*, 5 Car. & P. 489.

and placed, as a notice, upon the outside of his premises, "Beware of the dog." But otherwise, if the person's attention was drawn to the notice, and he was cautioned not to cross the fence, yet voluntarily exposed himself to the danger.¹ If the act of a dog is the sole and proximate cause of the shying of a horse, and such shying is not the result of any vicious habit of the horse, the fact that it contributed to plaintiff's injury does not prevent him from maintaining an action against the owner of the dog.²

As to children, the law requires no higher degree of care from a child than may reasonably be expected in view of its age and situation. A child is not bound to act with the care and judgment of a grown person.³ Where a child is in the custody of its parent at the time, the latter must use ordinary care and watchfulness.⁴ To allow

¹ *Sawyer v. Jackson*, 5 N. Y. Leg. Obs. 380. Compare *Wheeler v. Brant*, 23 Barb. 324; *Logue v. Link*, 4 E. D. Smith, 63.

² *Denison v. Lincoln*, 131 Mass. 236.

³ *Munn v. Reed*, 4 Allen, 431; *Lynch v. Nurdin*, 1 Q. B. 29. In *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645, the plaintiff, a boy of thirteen, had been bitten by a dog which he met crossing a bridge and attempted to turn him back by striking at him with a stick. In affirming a judgment for damages, the court said: "The second ruling was, that if the plaintiff was old enough to know that striking the dog would be likely to incite the dog to bite, and did strike the dog, and did thereby incite the dog to bite him, he may, nevertheless, recover, if the jury think he was in the exercise of such care as would be due care in a boy of his years." We are of opinion that there is no error in this ruling. It was necessary that the plaintiff, though a boy, should prove that he was in the exercise of due care. But due care on his part did not require the judgment and thoughtfulness which would be expected of an adult under the same circumstances. It is that degree of care

which could reasonably be expected from a boy of his age and capacity: *Munn v. Reid*, 4 Allen, 431; *Carter v. Towne*, 98 Mass. 567; 96 Am. Dec. 682; *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Dowd v. Chicopee*, 116 Mass. 93. If the court had ruled that if the plaintiff was old enough to know that striking the dog would be likely to incite him to bite, he could not recover, it would have been erroneous. This is not the true test. It entirely disregards the thoughtlessness and heedlessness natural to boyhood. The plaintiff may have been old enough to know, if he stopped to reflect, that striking a dog would be likely to provoke him to bite, and yet in striking him he may have been acting as a boy of his age would ordinarily act under the same circumstances. The age of the plaintiff was an important fact for the consideration of the jury; but the court correctly held that the true rule was, that he was entitled to recover if he was in the exercise of that degree of care which, under like circumstances, would reasonably be expected of a boy of his years and capacity."

⁴ *Munn v. Reid*, 4 Allen, 431; *Logue v. Link*, 4 E. D. Smith, 63.

a child to play with a strange dog is not *per se* negligence in a parent.¹

ILLUSTRATIONS. — A permitted his mare to feed in the same field with B's bull. The bull gored the mare. *Held*, that A had no right of action against B therefor: *Carpenter v. Latta*, 29 Kan. 591. A woman offers a dog, lying on the sidewalk in front of a store, a piece of candy. The dog springs at her and bites her. *Held*, not contributory negligence in the woman: *Lynch v. McNally*, 73 N. Y. 347. A man left a dog, which he knew had bitten people, alone in his sleigh on a village street. A child of seven came along and "meddled" with the whip, whereupon the dog bit him. *Held*, that the owner was liable: *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6. A horse was accustomed to bite, and the owner kept him muzzled. While the horse was temporarily unmuzzled, standing on the sidewalk in front of the owner's premises, the plaintiff, in passing around the horse, was bitten upon the shoulder by him. *Held*, that the owner was liable in damages, although the plaintiff also knew that the horse was vicious, but did not discover when passing around him that his muzzle was off: *Koney v. Ward*, 36 How. Pr. 255. A woman, while standing on a bridge, was thrown over the railing by a passing bull. *Held*, that she was not guilty of gross negligence in not going off the bridge when she first saw the bull coming: *Barnum v. Terpenning*, Mich., 1889.

§ 1388. **Trespassers — Watch-dogs.** — That the plaintiff was trespassing on the land of the owner at the time will not defeat the action.² A person has a right to keep a watch-dog for the defense of his house, his garden, and his fields, and he may use him for that purpose in the night-time;³ but this will not permit a man to have a ferocious dog running loose in his grounds in the daytime, and if he injures a trespasser, the owner will be liable.⁴

¹ *Munn v. Reid*, 4 Allen, 431.

² *Marble v. Ross*, 124 Mass. 47; *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Kelly v. Tilton*, 3 Keyes, 263; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600; *Glidden v. Moore*, 14 Neb. 84; 45 Am. Rep. 98.

³ *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306. No action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night: *Brock v. Copeland*, 1 Esp. 203.

⁴ *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Kelly v. Tilton*, 3 Keyes, 263; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175; *Sherfey v. Bartley*, 4 Sneed, 58; 67 Am. Dec. 597. Even if the owner give notice of the dog being in the grounds. It is no answer to such an action that a printed notice was put up, if it appears that the plaintiff could not read: *Sarch v. Blackburn*, *Moody & M.* 505; 4 Car. & P. 297.

ILLUSTRATIONS.—The owner of uninclosed pasture-land, across which there was a neighborhood road not laid out as a public highway, but which had been used ever since the country was settled, fastened a bull, which he knew to be vicious, so that a person passing along the road was gored thereby. *Held*, that he was liable, though he had warned the person not to pass: *Glidden v. Moore*, 14 Neb. 84; 45 Am. Rep. 98.

§ 1389. **Negligence in Driving, Securing, or Using Animals.**—Every person having charge of an animal is bound to use due care under the circumstances which surround him,¹ and if in securing or driving or otherwise using or tending such animal he does not use such care, and another is injured, he is liable in damages.² Where there is no want of care, and a person's horses break away and do damage, he is not liable.³ Driving animals along a highway is not such an unusual use of them as to require the driver to exercise extraordinary care.⁴ But the driver of a cow, known to him to be vicious, not using due care, is liable to any person injured by her, who is in the exercise of due care.⁵ In an action for personal injuries occasioned

¹ *Dolfinger v. Fishback*, 12 Bush, 474; *Meredith v. Reed*, 26 Ind. 334; *Frazer v. Kimler*, 2 Hun, 514; *Sullivan v. Scripture*, 3 Allen, 565, the court saying: "And what is reasonable or due care depends in every case on the subject-matter to which the care is to be applied, and the circumstances attending that subject-matter at the time when care is required. . . . The defendant's horse and wagon, at the time of the injury, were near to a military encampment, and where there was a throng of people. If so, the defendant was bound to use greater care of their movements than the law would have required of him if they had been in a less frequented place."

² *Hewes v. McNamara*, 106 Mass. 281; *Ficken v. Jones*, 28 Cal. 618 (negligently driving cattle through streets); *Dickson v. McCoy*, 39 N. Y. 400; *Goodman v. Gay*, 15 Pa. St. 188; 53 Am. Dec. 589; *Barnes v. Chapin*, 4 Allen, 444; 81 Am. Dec. 710; *Bowyer v. Burlew*, 3 Thomp. & C. 362; *Illidge*

v. Goodwin, 5 Car. & P. 190; *Lynch v. Nurdin*, 1 Q. B. 29; *Bennett v. Ford*, 47 Ind. 264; *Hummell v. Wester*, 1 Bright. N. P. 133; *Coggsell v. Baldwin*, 15 Vt. 404; 11 Am. Dec. 686; *Shawhan v. Clarke*, 24 La. Ann. 390. Where defendants knew that the bull was wild, and had been told it was safer to lead him by a ring in his nose, but tied him, head and foot, it was for the jury to determine whether defendants were guilty of negligence in driving him on the highway, though the bull had never attacked anyone before: *Barnum v. Terpenning*, Mich., 1889.

³ *Brown v. Collins*, 53 N. H. 442; 16 Am. Rep. 372. The owner of a runaway horse is not responsible for the injury resulting from a collision with another horse and carriage, no negligence on the part of the owner of the runaway horse being shown: *Shawhan v. Clarke*, 24 La. Ann. 390.

⁴ *Reeves v. R. R. Co.*, 30 Pa. St. 454; 72 Am. Dec. 713.

⁵ *Hewes v. McNamara*, 106 Mass. 281.

by the defendant's bull while being led through a street of a city, the jury may infer that the defendant knew what is common knowledge in regard to the propensities of such an animal; and testimony that the defendant, after the accident, said that it was careless in his servant to lead the bull in the manner in which he was led may be considered by the jury as an admission that the bull needed to be kept under control, and that the care taken in driving him through the street was insufficient.¹ A person allowing a horse to run loose in the streets of a city is guilty of negligence, and liable for the damage he does.² But where a horse strays on a highway, and, without apparent reason, kicks a child, no action will lie against the owner of the horse, unless he knew that the horse was likely to commit such an act.³

ILLUSTRATIONS. — Defendant was intoxicated, fell asleep in his sleigh, and his horses ran away, and ran against the plaintiff's horse. *Held*, that he was liable: *Waldron v. Hopper*, 1 N. J. L. 339.⁴ Defendant allows his mules to stand alone and untied near by a railroad track, so that the whistle of a locomotive frightens them, and they run away and injure the plaintiff's horses. *Held*, that he is liable: *Drake v. Mount*, 33 N. J. L. 441. Plaintiff sustained injuries by the kick of a horse while he was, by defendant's invitation, attending a sale in defendant's yard, which was used for the sale of horses by auction. Plaintiff was walking up the yard behind a row of spectators, who were watching a horse then on sale. The horse was being led with a halter, by a servant of defendant's, down a lane formed by the line of spectators on one side, and a blank wall on the other, there being no barrier between the spectators and the horse. When the horse was about ten yards from plaintiff (the crowd of spectators then being between them), another servant of the defendant, standing on the wall side of the lane, suddenly whipped the horse, to make him trot and show his paces, the consequence being that the horse swerved into and through the crowd, who made way for him, and lashing out, kicked plaintiff. No evidence was given as to the nature of the blow, of the character of the horse, or of

¹ *Linnehan v. Sampson*, 126 Mass. 506; 30 Am. Rep. 692.

² *Goodman v. Gay*, 15 Pa. St. 188; 53 Am. Dec. 589; *Rossell v. Cottom*, 31 Pa. St. 526.

³ *Cox v. Burbridge*, 13 Com. B., N. S., 430; 9 Jur., N. S., 970; 32 L. J. Com. P. 89; 11 Week. Rep. 435.

⁴ But it was ruled that trespass and not case was the proper form of action.

the manner in which he was led, nor was any evidence given to show that it was usual, in the case of horse sales of this description, to erect a barrier between the horses and the spectators. *Held*, that there was evidence of negligence on the part of the defendant's servants which should have been submitted to the jury: *Abbott v. Freeman*, 34 L. T., N. S., 544. A horse and wagon were left standing in the street, the horse being unhitched. The servant of a telegraph company, engaged in repairing the wires, allowed a broken wire to strike the horse, thereby frightening him, and causing him to run, resulting in the death of the horse. In a suit against the company for the value of the horse, *held*, that the negligence of the driver in leaving the horse was such as to debar the owner from recovering: *Western Union Tel. Co. v. Quinn*, 56 Ill. 319.

§ 1390. Owner Transferring Care of Animal — Bound to Give Notice of Vicious Propensities. — One letting an animal to another for hire, or letting a biting or kicking horse to another for hire, or leaving it with a blacksmith to be shod, or with a hostler to be groomed, is bound to inform the party receiving the horse of his vicious habits; otherwise he will be liable for damages which may arise in consequence of these habits.¹ But the habits must be habits directly dangerous, as kicking and biting in horses, hooking in horned animals, and biting in dogs.²

ILLUSTRATIONS. — Defendant owned a mare which had a habit of suddenly "pulling" back upon her halter when excited or restless. This habit was known to defendant. He left the mare at a hotel, kept by plaintiff's employer, to be cared for, giving plaintiff no notice of the habit. While plaintiff was hitching the mare in the stable, and in doing so had put her halter-rope through a ring, she pulled suddenly back, drawing the rope through the ring. Plaintiff's finger was caught between the rope and ring and torn to pieces. *Held*, that defendant was not bound to notify plaintiff of the habit of the mare to pull: *Keshan v. Gates*, 2 Thomp. & C. 288.

§ 1391. Liability for Trespasses of Animals. — The mere trespasses of animals, without any other injury, upon the uninclosed lands of another, give no right of

¹ Thompson on Negligence, p. 217, sec. 30; *Campbell v. Page*, 67 Barb. 113. ² *Id.*; *Keshan v. Gates*, 2 Thomp. & C. 288.

action against the owner; they are deemed by the law too insignificant to be noticed.¹ But if they do other damage while trespassing, their owners are liable, without regard to proof of notice of their mischievous disposition.² At common law the owner of land was not obliged to fence against cattle.³ The owner of domestic animals, such as horses, cattle, sheep, swine, etc., was at common law bound to keep them safely on his own property. If they broke out and got upon the land of another, he was liable for the damage they might do there, without regard to *scienter*.⁴ And this is the rule in the United

¹ *Bush v. Brainard*, 1 Cow. 78; 13 Am. Dec. 513; *Caulkins v. Mathews*, 5 Kan. 191; *Maltby v. Dihel*, 5 Kan. 430; *Hess v. Lupton*, 7 Ohio, 216; *Durham v. Musselman*, 2 Blackf. 96; 18 Am. Dec. 133; *Brown v. Giles*, 1 Car. & P. 118; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175. *Contra*, *Young v. Harvey*, 16 Ind. 314; *Knight v. Abert*, 6 Pa. St. 472; 47 Am. Dec. 478, the court saying: "In this, and perhaps every other American state, an owner of cattle is not liable to an action for their browsing on his neighbor's uninclosed woodland. But it follows not that because such browsing is excusable as a trespass, it is matter of right. It is an immunity, not a privilege; or, at most, a license revokable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*, or perhaps because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is unappreciable, even as a subject of nominal damages, and would probably be held so, even in England, where waste land is altogether worthless."

² *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175. A dog, while trespassing on A's land, kills A's cow. The owner of the dog is liable, although he had no previous knowledge of the dog's vi-

cious propensity: *Chunot v. Larson*, 43 Wis. 536; 28 Am. Rep. 567. If oxen break the plaintiff's close and kill his cow, the owner is answerable, without proving that he knew they were accustomed to gore: *Angus v. Radin*, 5 N. J. L. 815; 8 Am. Dec. 626.

³ *French v. Cresswell*, 13 Or. 418. And see *Hahn v. Garratt*, 69 Cal. 146; *Bullard v. Williamson*, 69 Iowa, 416; *Lawrence v. Combs*, 37 N. H. 331; 72 Am. Dec. 332; *Holden v. Shattuck*, 34 Vt. 336; 80 Am. Dec. 684.

⁴ *McDonnell v. R. R. Co.*, 115 Mass. 564; *Decker v. Gammon*, 44 Me. 322; 69 Am. Dec. 99; *Studwell v. Ritch*, 14 Conn. 292; *Page v. Hollingsworth*, 7 Ind. 317; *Van Leuven v. Lyke*, 1 N. Y. 515; 49 Am. Dec. 346; *Stafford v. Ingersoll*, 3 Hill, 38; *Dolph v. Ferris*, 7 Watts & S. 367; *Pierce v. Hosmer*, 66 Barb. 345; *McBride v. Lynd*, 55 Ill. 411; *Dunkle v. Kocker*, 11 Barb. 387; *Angus v. Radin*, 5 N. J. L. 815; 8 Am. Dec. 626; *Holliday v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678; *Gresham v. Taylor*, 51 Ala. 505; *Forsythe v. Price*, 8 Watts, 282; 34 Am. Dec. 465; *Myers v. Dodd*, 9 Ind. 290; 68 Am. Dec. 624; *McIlvaine v. Lantz*, 100 Pa. St. 586; 45 Am. Rep. 400; *Indianapolis etc. R. R. Co. v. McClure*, 26 Ind. 370; 89 Am. Dec. 467; *Eames v. R. R. Co.*, 98 Mass. 560; 96 Am. Dec. 676. "The common law," it is said in *Van Leuven v. Lyke*, *supra*, "holds a man answerable, not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many

States.¹ And in many of the states permitting stock to run at large is such negligence on the part of the owner as to bar all right of recovery for any injuries to them, except such as are wanton or willful.² In other states if the

of such animals, such as oxen, horses, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land; and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice in fact of such propensity: 3 Bla. Com. 211; 1 Chit. Pl. 70. And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure of the former under such circumstances. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking or entering the close, in such action, is the substantive allegation, and the rest is laid as matter of aggravation only."

¹ *Indiana*. — Indianapolis etc. R. R. Co. v. McClure, 26 Ind. 370; 89 Am. Dec. 467; Cin. etc. R. R. Co. v. Street, 50 Ind. 225; Jeffersonville etc. R. R. Co. v. Underhill, 48 Ind. 389; Lafayette etc. R. R. Co. v. Shriner, 6 Ind. 141.

Maryland. — Balt. etc. R. R. Co. v. Lamborn, 12 Md. 257; Keech v. R. R. Co., 17 Md. 33.

Michigan. — Williams v. R. R. Co., 2 Mich. 260; 55 Am. Dec. 59.

Minnesota. — Locke v. R. R. Co., 15 Minn. 351.

New Jersey. — Vandegrift v. Rediker, 22 N. J. L. 185; 51 Am. Dec. 262; Price v. R. R. Co., 31 N. J. L. 229; 32 N. J. L. 19.

New York. — Halloran v. R. R. Co., 2 E. D. Smith, 257; Marsh v. R. R. Co., 14 Barb. 364; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; 49 Am. Dec. 239; Clarke v. R. R. Co., 11 Barb. 112; Terry v. R. R. Co., 22 Barb. 575; Munger v. R. R. Co., 4 N. Y. 349; 53 Am. Dec. 384.

Pennsylvania. — R. R. Co. v. Skinner, 19 Pa. St. 298; 57 Am. Dec. 654; Reeves v. R. R. Co., 30 Pa. St. 455; 72 Am. Dec. 713.

Wisconsin. — Chicago etc. R. R. Co. v. Goss, 17 Wis. 428; Stucke v. R. R. Co., 9 Wis. 203; Bennett v. R. R. Co., 19 Wis. 145; Galpin v. R. R. Co., 19 Wis. 604.

Kentucky. — Louisville etc. R. R. Co. v. Ballard, 2 Met. (Ky.) 177.

Massachusetts. — Stearns v. R. R. Co., 1 Allen, 493; McDonnell v. R. R. Co., 115 Mass. 564; Maynard v. R. R. Co., 115 Mass. 458; 15 Am. Rep. 119; Eames v. R. R. Co., 98 Mass. 560; 96 Am. Dec. 676.

New Hampshire. — Giles v. R. R. Co., 55 N. H. 552; Mayberry v. R. R. Co., 47 N. H. 391.

Vermont. — Jackson v. R. R. Co., 25 Vt. 150; 60 Am. Dec. 246; Trow v. R. R. Co., 24 Vt. 488; 58 Am. Dec. 191.

² *Indiana*. — Indianapolis etc. R. R. v. McClure, 26 Ind. 370; 89 Am. Dec. 467; Lafayette etc. R. R. Co. v. Shriner, 6 Ind. 141; Indianapolis etc. R. R. Co. v. Harter, 38 Ind. 557; Jeffersonville etc. R. R. Co. v. Underhill, 48 Ind. 389; Cincinnati etc. R. R. Co. v. Street, 50 Ind. 225.

New Jersey. — Vandegrift v. Rediker, 22 N. J. L. 185; 51 Am. Dec. 262; Price v. R. R. Co., 31 N. J. L. 229; 32 N. J. L. 19.

Minnesota. — Locke v. R. R. Co., 15 Minn. 351.

Massachusetts. — Maynard v. R. R. Co., 115 Mass. 458; 15 Am. Rep. 119; McDonnell v. R. R. Co., 115 Mass.

escape of the cattle is not due to the negligence of the owner, who has used due care to restrain them, he may recover damages if they are killed or injured by the negligence of another, even though they are trespassing at the time.¹ In other states, again, cattle may run at large on uninclosed lands, and one is obliged to fence his neighbor's cattle out, if he desires to be free from their trespasses; and unless they break through a lawful fence, their owner is not responsible.² "This rule," says Judge Thompson, "is in force in several of the states; has been modified in some and abrogated in others."³ The statutes on the subject are various, both in their language and construction, and cannot be set out here.⁴ If contiguous

564; *Eames v. R. R. Co.*, 98 Mass. 561; 96 Am. Dec. 676; *Darling v. R. R. Co.*, 121 Mass. 118.

Vermont. — *Jackson v. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246.

Maryland. — *Baltimore etc. R. R. Co. v. Lamborn*, 12 Md. 257; *Keech v. R. R. Co.*, 17 Md. 33. But see *Baltimore etc. R. R. Co. v. Mulligan*, 45 Md. 487.

Pennsylvania. — *R. R. Co. v. Skinner*, 19 Pa. St. 298; 57 Am. Dec. 654; *North Pennsylvania R. R. Co. v. Rehman*, 49 Pa. St. 101; 88 Am. Dec. 491; *Drake v. R. R. Co.*, 51 Pa. St. 240.

New York. — *Tonawanda etc. R. R. Co. v. Munger*, 5 Denio, 259; 49 Am. Dec. 239.

¹ *Connecticut.* — *Isbell v. R. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78; *Bulkeley v. R. R. Co.*, 27 Conn. 479.

Illinois. — *Toledo etc. R. R. Co. v. Johnson*, 74 Ill. 83; *Cairo etc. R. R. Co. v. Woolsey*, 85 Ill. 370; *Ohio etc. R. R. Co. v. Fowler*, 85 Ill. 21; *Illinois etc. R. R. Co. v. Patchin*, 16 Ill. 198; 61 Am. Dec. 65.

Kansas. — *Pacific R. R. Co. v. Brown*, 14 Kan. 469.

Massachusetts. — *Towne v. R. R. Co.*, 124 Mass. 101.

Wisconsin. — *Chicago etc. R. R. Co. v. Goss*, 17 Wis. 428; *Curry v. R. R. Co.*, 43 Wis. 665; *Laude v. R. R. Co.*, 33 Wis. 640; *McCandless v. R. R. Co.*, 45 Wis. 365.

² *Alabama.* — *Mobile etc. R. R. Co. v. Williams*, 53 Ala. 595.

California. — *Waters v. Moss*, 12 Cal. 535; 73 Am. Dec. 561; *Logan v. Gedney*, 38 Cal. 581.

Iowa. — *Alger v. R. R. Co.*, 10 Iowa, 268.

Missouri. — *Gorman v. R. R. Co.*, 26 Mo. 442; 72 Am. Dec. 220; *Hannibal etc. R. R. Co. v. Kenney*, 41 Mo. 271; *McPheeters v. R. R. Co.*, 45 Mo. 23; *Tarwater v. R. R. Co.*, 42 Mo. 193.

Mississippi. — *Vicksburg etc. R. R. v. Patton*, 31 Miss. 157; 66 Am. Dec. 552; *Memphis etc. R. R. Co. v. Blakey*, 43 Miss. 218; *Mobile etc. R. R. Co. v. Hudson*, 50 Miss. 572; *Raiford v. R. R. Co.*, 43 Miss. 233; *New Orleans etc. R. R. Co. v. Field*, 46 Miss. 573.

Ohio. — *Cranston v. Cincinnati etc. R. R. Co.*, 1 Handy, 193; *Kerwhacker v. R. R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 246; *Cleveland etc. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Central etc. R. R. Co. v. Lawrence*, 13 Ohio St. 67; 82 Am. Dec. 434; *Marietta etc. R. R. Co. v. Stephenson*, 24 Ohio St. 48.

South Carolina. — *Murray v. R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219.

³ 1 Thompson on Negligence, 210.

⁴ See 1 Thompson on Negligence, 210-215, where a digest of the decisions of the states construing the statutes in regard to fences in the case of injuries to animals is given; *Knox v. Tucker*, 43 Me. 373; 77 Am. Dec. 233. In Iowa, to entitle a plaintiff to recover for damages caused by defendant's cattle, while running at large,

land-owners, by parol agreement, divide the fence between them, such agreement is binding so long as they act under it; and if one fails to make his part a legal fence, and the other's cattle escape into his field, he has no right to impound them.¹ If both parts of a partition fence are out of repair, and it cannot be proved whether the animals entered through the part the plaintiff was bound to keep up or not, there can be no recovery.² Where land-owners mutually waive the duty of keeping up a partition fence, each is liable for trespasses of his cattle to the other.³ In an action for a trespass by defendant's animals upon plaintiff's ground, the plaintiff cannot recover, in addition to the actual damages done by them, the cost of keeping them confined after he took them.⁴ Nor is the defendant liable for inroads of others' cattle through the breach of fence made by his own, unless occurring under his control.⁵ Where the damages were for injuries to the close itself on account of defendant's stallion breaking into it, it was held that they did not bar a subsequent action for damages resulting to plaintiff in consequence of his mare running in said close, having been gotten with foal by said stallion,—the fact of her being with foal not being known, and the damage to plaintiff therefrom, through loss of her work, etc., not having accrued when the former action was tried.⁶

breaking into the close of plaintiff and destroying his crops, he must show that the premises trespassed upon were inclosed by a lawful fence. The common-law rule that every man is required to keep his cattle upon his own premises under penalty of answering in damages for injuries committed by them while running at large is not applicable to the wants, habits, and necessities of the people of this state, nor in harmony with the genius of our institutions, and therefore has not been adopted, and is not the law of this state. One who sues for a trespass by cattle upon his land must show that he maintained a sufficient fence: *Frazier v. Nortinus*, 34

Iowa, 82. A horse in the street, damaging a barn-yard fence while fighting a horse that was inside, is liable, under the Wisconsin statute, to be distrained by the owner of the yard, as "doing damage within his inclosure": *Pettit v. May*, 34 Wis. 666.

¹ *Hitchcock v. Tower*, 55 Vt. 60.

² *Deyo v. Stewart*, 4 Denio, 101.

³ *Milligan v. Wehinger*, 68 Pa. St. 235. As to partition fences generally, see note to *Myers v. Dodd*, 9 Ind. 290; 68 Am. Dec. 624.

⁴ *North v. McDonald*, 47 Barb. 528.

⁵ *Durham v. Goodwin*, 54 Ill. 469.

⁶ *Hagan v. Casey*, 30 Wis. 553.

ILLUSTRATIONS.—Defendants' horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', *held*, that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on their part: *Ellis v. Loftus Iron Co.*, L. R. 10 Com. P. 10; 23 Week. Rep. 246. Defendant's bull escaped from his pasture onto plaintiff's land, through a gap in a fence which plaintiff was bound to maintain, and there injured plaintiff's horse. *Held*, that defendant was not liable, as the injury was the result of plaintiff's neglect: *Scott v. Grover*, 56 Vt. 499; 48 Am. Rep. 814. A and B occupy adjoining lands, inclosed with one fence and forming one field, and A authorizes C to turn cattle into the inclosure, representing to C that he, A, owns the whole. The cattle go upon the land of B. *Held*, C is liable in trespass for all the damage done by the cattle, notwithstanding that he may have believed that A had full authority so to do: *Daniels v. Aholtz*, 81 Ill. 440. A and B, adjoining land-owners, made a parol agreement to keep in repair the partition fence, and A leased his land. *Held*, that A's tenant could not maintain an action against B for damages caused by the latter's animals, which broke through that portion of the fence which A was, by the terms of the agreement, to maintain: *Baynes v. Chastain*, 68 Ind. 376. The beast of the defendant escaped from his field through an insufficient fence into the field of A, thence into the field of B, and thence into the field of plaintiff, and injured the plaintiff's mare. *Held*, that the defendant was liable for the injuries, although, as between him and A, the latter was bound to keep the fence between their fields in repair, although the fence between the plaintiff's field and B's was insufficient, and although the defendant did not know that the beast was vicious: *Lyons v. Merrick*, 105 Mass. 71. The action was for injuries to a colt while lawfully in the pasture of a third person, caused by the defendant's dog, which he had unlawfully taken within the pasture. *Held*, that no averment of notice of a vicious disposition of the dog was necessary to render the defendant liable: *Green v. Doyle*, 21 Ill. App. 205.

§ 1392. **Driving Cattle on Highway.**—As a man has a right to drive his cattle along the highway, and as it is difficult even with care to drive cattle, the principle of the law which required the owner of cattle to keep them out of his neighbor's land at his peril is so far modified as to hold the owner not liable for the trespasses of his cattle

which, while being properly driven along the highway, casually wander on the land of another, provided he removes them with reasonable promptitude.¹ But as cattle have no more than the public any right in the highway except to pass and repass, if the owner puts them there to graze, and they get into another's lot, he is liable.² And if after lawfully getting into the close adjoining the highway they proceed into that of another beyond, their owner is responsible for this second trespass.³

§ 1393. **Keeping Diseased Animals.**—Keeping diseased animals on one's premises—even if the disease is an infectious one—is not *per se* negligence, though there may be animals of another on adjoining premises.⁴ But where diseased animals trespass on another man's land and infect his animals, the owner of the diseased animals is liable without proof of *scienter*;⁵ and so where there is fraud or false representations.⁶ An action will lie to recover damages sustained by the negligence of servants having the care of cattle which they know to be suffering from an infectious disease, in allowing such cattle to intermingle with other cattle.⁷ In an action for bringing horses diseased with glanders to the farm of the plaintiff, whereby the horses and stock of plaintiff became infected

¹ *Hartford v. Brady*, 114 Mass. 466; 19 Am. Rep. 377; *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *McDonnell v. R. R. Co.*, 115 Mass. 564; *Coal v. Crummet*, 13 Me. 250.

² *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *Lyman v. Gipson*, 18 Pick. 422; *Pool v. Alger*, 11 Gray, 489; 71 Am. Dec. 726; *Avery v. Maxwell*, 4 N. H. 36; *Harrison v. Brown*, 5 Wis. 27. *Aliter* where by a by-law of the town cattle are permitted to graze upon the highway: *Holladay v. Marsh*, 3 Wend. 142; 20 Am. Dec. 678.

³ *McDonnell v. R. R. Co.*, 115 Mass. 564; *Mills v. Stark*, 4 N. H. 512; 17 Am. Dec. 444.

⁴ *Fisher v. Clark*, 41 Barb. 329; *Mills v. R. R. Co.*, 2 Rob. (N. Y.) 326;

affirmed 41 N. Y. 619. *Aliter* by statute in Illinois: Ill. Laws 1865, p. 126, sec. 2; *Herrick v. Gary*, 65 Ill. 101; 83 Ill. 85.

⁵ *Barnum v. Vandusen*, 16 Conn. 200; *Noyes v. Colby*, 30 N. H. 143; *Eaton v. Winnie*, 20 Mich. 159; 4 Am. Rep. 377. One knowing his cattle to be infected with a contagious disease, and allowing them to run at large, is liable to another injured thereby, without regard to any statute prohibiting importation of cattle: *Kemmish v. Ball*, 30 Fed. Rep. 759.

⁶ *Eaton v. Winnie*, 20 Mich. 157; 4 Am. Rep. 377.

⁷ *Earp v. Faulkner*, 34 L. T., N. S., 284.

with the same disease and died, the *gravamen* of the action is not deceit; but the liability of defendant arises from the fact of his taking horses known by him to be infected with a dangerous disease into plaintiff's close.¹ Under a statute giving a right of action against one willfully and knowingly driving diseased and distempered cattle, etc., defendant's knowledge of the diseased condition of his cattle must be shown.²

ILLUSTRATIONS. — The owner of diseased horses negligently allows them to gnaw through his wall into an adjoining stable, or to go to drink at a public tank, whereby other horses take the disease. *Held*, that he is liable to the owner of the latter: *Mills v. R. R. Co.*, 2 Rob. (N. Y.) 326. G.'s sheep, infected with the scab, escaped into H.'s pasture through defects in G.'s part of the division fence, and caused a flock consisting of sheep of H. and sheep of H.'s father, to become infected. *Held*, that H. could recover of G., although H.'s sheep might have caught the infection from those of his father, if the latter's sheep had become first infected from G.'s sheep: *Herrick v. Gary*, 65 Ill. 101. A's sheep, being diseased, got into B's field, where his sheep were grazing, and infected them with the disease. It did not appear how they got there. A, on being told of it, used expressions indicating knowledge that his sheep were diseased. In an action against him for suffering his sheep to go at large, *held*, that, in the absence of negligence, proof of a *scienter* was necessary, and there was no sufficient evidence of it: *Cooke v. Waring*, 2 Hurl. & C. 332; 32 L. J. Ex. 262. By a railway accident a large number of swine were loosed. The defendant, the manager of the road, directed his servants to collect them, and put them in a safe place. They put them in the plaintiff's barn-yard, in his absence and without his leave; but on his return he did not object, but assisted in feeding them, and also in taking them away for reshipment, and rendered a bill for food, services, and damage to grass. The swine were diseased, and infected the plaintiff's swine, but neither he nor the defendant knew of the disease. *Held*, that the defendant, having acted within his authority, was not liable: *Hawks v. Locke*, 139 Mass. 205; 52 Am. Rep. 702.

§ 1394. **Selling Diseased Animals.** — The sale of diseased animals has been held not to be unlawful; and although the seller knew at the time that the animals were

¹ *Hite v. Blandford*, 45 Ill. 9.

² *Bradford v. Floyd*, 80 Mo. 207.

infected, and did not disclose it to the buyer, yet he is not liable for injuries occasioned by the spread of the disease among the animals of the purchaser; "for the maxim of *caveat emptor* applies to such a case."¹ It would seem that there are decisions of authority which hold the seller to a liability in such a case;² and certainly where the seller has been guilty of any fraud or misrepresentation, he is liable.³

ILLUSTRATIONS. — A bought a cow of B on the assurance of the latter that he would warrant her, and that she had come off his father's farm. It proved to be a foreign cow, and a few days after the purchase, she fell ill, and died, of what proved to be the cattle-plague. Five other cows which had been in the same shed were attacked the same week, and eventually A lost them as well. The symptoms in all the cases were alike. *Held*, that as A was induced to buy the cow through B's misrepresentation, the latter was answerable for the consequences which ensued by her coming in contact with other cattle: *Mullett v. Mason*, L. R. 1 Com. P. 559; 14 Week. Rep. 898; 14 L. T., N. S., 558.

¹ Thompson on Negligence, p. 207, sec. 22; citing *Hill v. Balls*, 2 Hurl. & N. 299. The seller does not impliedly represent that they are not, so far as he knows, infected with a contagious disease, and is not liable in an action for false representation at the suit of a person who has purchased such animals and consequently suffered loss: *Ward v. Hobbs*, 26 Week. Rep. 151; reversing the judgment of the

queen's bench division, 25 Week. Rep. 555; 26 L. T., N. S., 511; 46 L. J. Q. B. Div. 473; L. R. 2 Q. B. Div. 331.

² *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Hite v. Blandford*, 45 Ill. 9; *Penton v. Murduck*, 22 L. T., N. S., 371.

³ *Mullett v. Mason*, L. R. 1 Com. P. 559; *Fultz v. Wycoff*, 25 Ind. 321. See *post*, title Contracts.

CHAPTER LXXV.

INJURIES TO ANIMALS BY RAILROADS.¹

- § 1395. Duty to fence railroad — At common law.
- § 1396. By contract.
- § 1397. Duty as to cattle on track — Slackening speed.
- § 1398. Ringing bell and sounding whistle.
- § 1399. Evidence of negligence — Presumption — Burden of proof.
- § 1400. Duty to fence by statute — In general.
- § 1401. Who and what within statutory protection.
- § 1402. At what places fences not required.
- § 1403. In cities, towns, and villages.
- § 1404. Highway crossings and highways.
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- § 1406. What fence sufficient.
- § 1407. Degree of care in maintenance of fence — Notice of defects.
- § 1408. Private crossings.
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- § 1411. Contributory negligence — As to fences.
- § 1412. As to permitting cattle to run at large.
- § 1413. What kinds of injuries to cattle are within statute.
- § 1414. Injuries to railroad.
- § 1415. Law and fact.
- § 1416. Pleading.
- § 1417. Burden of proof — Evidence of negligence.
- § 1418. Measure of damages.

§ 1395. Duty to Fence Railroad — At Common Law. —
 There is no duty resting upon railroads to fence their tracks, in the absence of a statute requiring it to be done; but it is held that a failure to fence increases the care required of the railroad as to stock, and hence to this extent is relevant on the question of negligence.²

§ 1396. By Contract. — Where the railroad has agreed to fence its line through certain land, a failure to do so

¹ As to injuries to animals in their carriage, see *post*, Title Bailments. *Kerwhacker v. R. R. Co.*, 3 Ohio St. 185; 62 Am. Dec. 246; *Gorman v. R. R. Co.*, 26 Mo. 441; 72 Am. Dec. 220;

² *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 157; 66 Am. Dec. 552; *Memphis etc. R. R. Co. v. Orr*, 43 Miss. 279; *Sullivan v. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698. See *ante*, sec. 1391.

by which cattle get on the track and are killed will render it liable, in the absence of contributory negligence by the owner.¹ In some states an obligation to fence the track will be implied, if in the condemnation of the right of way the award of damages was made on the understanding that the company was to fence both sides of the track. On a failure to do so, the company cannot impute negligence to the owner of cattle straying upon the roadway through the want of such fence.² In other states the grant of the right of way by the plaintiff over his farm implies no obligation on his part to fence the railroad track, nor does the acceptance of the grant on the part of the railroad company.³

§ 1397. Duty as to Cattle on Track—Slackening Speed.—Where by checking the speed of the train, animals on the track could escape, it is negligence on the part of the railroad servants not to do so.⁴ But the rights of passengers are superior to those of the owners of trespassing cattle, and the courts do not require the former to be endangered for the purpose of protecting the latter.⁵ The question is, whether, when the stock is discovered on

¹ *Fernow v. R. R. Co.*, 22 Iowa, 528; *Joliet etc. R. R. Co. v. Jones*, 20 Ill. 222; *Drake v. R. R. Co.*, 51 Pa. St. 240.

² *Quimby v. R. R. Co.*, 23 Vt. 388; *Trow v. R. R. Co.*, 24 Vt. 488; 58 Am. Dec. 191. And see *In re Rensselaer R. R. Co.*, 4 Paige, 553.

³ *Louisville etc. R. R. Co. v. Milton*, 14 B. Mon. 75; 58 Am. Dec. 647; *Louisville etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Indianapolis etc. R. R. Co. v. Brownburg*, 32 Ind. 200. See *Campbell v. R. R. Co.*, 50 Conn. 128.

⁴ *Chicago etc. R. R. Co. v. Barrie*, 55 Ill. 227; *Rockford etc. R. R. Co. v. Linn*, 67 Ill. 110; *Illinois etc. R. R. Co. v. Wren*, 43 Ill. 78; *Rockford etc. R. R. Co. v. Rafferty*, 73 Ill. 58; *Lapine v. R. R. Co.*, 20 La. Ann. 158; *Aycock v. R. R. Co.*, 6 Jones, 232; *Jones v. R. R. Co.*, 70 N. C. 626;

Page v. R. R. Co., 71 N. C. 222; *Paris etc. R. R. Co. v. Mullins*, 66 Ill. 526; *Toledo etc. R. R. Co. v. McGinnis*, 71 Ill. 347; *Searles v. R. R. Co.*, 35 Iowa, 490; *Toledo etc. R. R. Co. v. Milligan*, 52 Ind. 506; *Reeves v. R. R. Co.*, 30 Pa. St. 454; 72 Am. Dec. 713; *Johnson v. R. R. Co.*, 25 W. Va. 570; that reversing an engine is hurtful to its machinery is no excuse: *East Tennessee etc. R. R. Co. v. Selcer*, 7 Lea, 557.

⁵ *Smith v. R. R. Co.*, 34 Iowa, 506; *Louisville etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Darling v. R. R. Co.*, 121 Mass. 118; *Eames v. R. R. Co.*, 98 Mass. 560; 96 Am. Dec. 676; *Maynard v. R. R. Co.*, 115 Mass. 458; 15 Am. Rep. 119; *McDonnell v. R. R. Co.*, 115 Mass. 564; *Central R. R. Co. v. Lawrence*, 13 Ohio St. 66; 82 Am. Dec. 434.

the track, the company could, without imperiling the persons or property intrusted to it for transportation, avoid injury to the stock. If so, the company is chargeable with negligence.¹ It is negligence to run a train on a straight track in the night-time at such a speed that the train cannot be stopped in the distance at which the engineer can see cattle or other obstructions on the track by the aid of a head-light.² Where there is less danger to the train and its contents from a collision with stock on the track while running at a high rate of speed than at a slower rate, it is the duty of the engineer, upon coming in sight of the animals, if it is not possible to stop the train before coming up with them, to increase the rate of speed, notwithstanding the escape of the animals may thereby be rendered more difficult.³ It is not necessary that the engineer on seeing animals on the track should check the speed, where he reasonably believes that to blow the whistle will be sufficient, or that they will leave the track in time;⁴ or where the attempt to stop would be useless.⁵ Whether the train should have been checked or stopped is usually a question of fact depending on the circumstances of the case.⁶ It is negligence not to keep a proper lookout for animals on the track,⁷ and though a railroad is fenced, it is liable for willfully killing animals by chasing them on the track without attempting to stop the train.⁸

¹ *Wallace v. R. R. Co.*, 74 Mo. 594.

² *Memphis etc. R. R. Co. v. Lyon*, 62 Ala. 71.

³ *Owens v. R. R. Co.*, 58 Mo. 387; *Bemis v. R. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339; *Louisville etc. R. R. Co. v. Milton*, 14 B. Mon. 75; 58 Am. Dec. 647; *Louisville etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177.

⁴ *Little Rock etc. R. R. Co. v. Trotter*, 37 Ark. 593; *Hot Springs etc. R. R. Co. v. Newman*, 36 Ark. 607; *Wabash etc. R. R. Co. v. Krough*, 13 Ill. App. 431.

⁵ *Alabama etc. R. R. Co. v. Chapman*, 80 Ala. 615; *Hawker v. R. R. Co.*, 15 W. Va. 628; 36 Am. Rep. 825; *Chicago etc. R. R. Co. v. Jones*, 59 Miss. 465; *East Tennessee etc. R. R. Co. v. Bayliss*, 77 Ala. 429; 54 Am. Rep. 69.

⁶ *Mobile etc. R. R. Co. v. Holt*, 62 Miss. 170; *Wilson v. R. R. Co.*, 90 N. C. 69.

⁷ *Snowden v. R. R. Co.*, 95 N. C. 93.

⁸ *New Albany etc. R. R. Co. v. McNamara*, 11 Ind. 543.

ILLUSTRATIONS.—Several cattle were crowded on a railroad track in plain view of the engineer for one hundred rods, and he made no effort to stop the train, and the cattle were injured. *Held*, that the company was liable: *Lawson v. R. R. Co.*, 57 Iowa, 672. A cow, driven from the track by the whistle, after running along by a fence parallel to the track, attempted to cross and was struck by the train. *Held*, a question for the jury whether defendant was guilty of negligence in not slackening speed after the cow was driven off the track: *Mobile etc. R. R. Co. v. Holt*, 62 Miss. 170.

§ 1398. **Ringling Bell and Sounding Whistle.**—Where ringing the bell or sounding the whistle would have driven the animals from the track, or enabled those in charge of them to get them out of danger, a failure to ring such bell or sound such whistle is evidence of negligence.¹ But where the giving of signals would have been unavailing to prevent the injury, failing to give them is not evidence of negligence.² Where statutes require that the engineer, upon approaching crossings, stations, etc., shall sound the steam-whistle and ring the bell, and that, on perceiving any obstacle on the road, he shall use all means in his power known to skillful engineers in order to stop the train, the failure to do so raises, in some states, a presumption of negligence;³ in others it is conclusive;⁴ in some it is not negligence, except when the injury is attributable to the failure to follow the statute.⁵

¹ Thompson on Negligence, 507; *Aycock v. R. R. Co.*, 6 Jones, 232; *Jones v. R. R. Co.*, 70 N. C. 626; *Page v. R. R. Co.*, 71 N. C. 222; *Illinois etc. R. R. Co. v. Phelps*, 29 Ill. 447; *Illinois etc. R. R. Co. v. Goodwin*, 30 Ill. 117; *Toledo etc. R. R. Co. v. Furgusson*, 42 Ill. 449; *Indianapolis etc. R. R. Co. v. Hamilton*, 44 Ind. 76; *Searles v. R. R. Co.*, 35 Iowa, 490; *Owens v. R. R. Co.*, 58 Mo. 387; *Bemis v. R. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339; *Illinois etc. R. R. Co. v. Peyton*, 76 Ill. 340; *Pennsylvania R. R. Co. v. Krick*, 47 Ind. 369; *Goodwin v. R. R. Co.*, 75 Mo. 73.

² *Flattes v. R. R. Co.*, 35 Iowa, 191; *Plaster v. R. R. Co.*, 35 Iowa, 449; *Illinois etc. R. R. Co. v. Phelps*, 29

Ill. 447; *Gilman etc. R. R. Co. v. Spencer*, 76 Ill. 192; *Smith v. R. R. Co.*, 19 Mo. App. 120.

³ *Mobile etc. R. R. Co. v. Williams*, 53 Ala. 595; *Mobile etc. R. R. Co. v. Malone*, 46 Ala. 391; *Central Branch R. R. Co. v. Phillippi*, 20 Kan. 9; *Owens v. R. R. Co.*, 58 Mo. 387; *Howenstein v. R. R. Co.*, 55 Mo. 33; *Nashville etc. R. R. Co. v. Thomas*, 5 Heisk. 262; *Memphis etc. R. R. Co. v. Smith*, 9 Heisk. 860. Where a statute requires locomotives at crossing to ring a bell "or" sound a whistle, both need not be done: *Cathcart v. R. R. Co.*, 19 Mo. App. 113.

⁴ *Nashville etc. R. R. Co. v. Thomas*, 5 Heisk. 262.

⁵ *Rockford etc. R. R. Co. v. Linn*.

§ 1399. **Evidence of Negligence — Presumption — Burden of Proof.** — The fact of animals being injured on the track by the railroad does not alone, it is held in a number of cases, raise a presumption of negligence.¹ In others, it is held that when the animals are not wrongfully on the track, proof of an injury to them by the railroad raises an inference of negligence, and puts the burden on the defendant to show that it was not in fault.² And in some states by statute the fact of killing or injuring stock is *prima facie* evidence of negligence, and places upon the defendant the burden of showing by positive evidence that due diligence and care were used to prevent the injury.³

§ 1400. **Duty to Fence — By Statute — In General.** — In a number of states statutes have been enacted requiring railroad companies to fence their tracks against live-stock, and rendering them absolutely liable, without regard to negligence, for injuries caused by their failing to do so.⁴

67 Ill. 109; Chicago etc. R. R. Co. v. Henderson, 66 Ill. 494; Great Western R. R. Co. v. Geddis, 33 Ill. 304; Illinois etc. R. R. Co. v. Phelps, 29 Ill. 447; Indianapolis etc. R. R. Co. v. Blackman, 63 Ill. 117; Chicago etc. R. R. Co. v. McDaniels, 63 Ill. 122; Quincy etc. R. R. Co. v. Wellhoener, 72 Ill. 60; Chicago etc. R. R. Co. v. Elmore, 67 Ill. 176; Illinois etc. R. R. Co. v. Gillis, 68 Ill. 317; Stoneman v. R. R. Co., 58 Mo. 503.

¹ Mobile etc. R. R. Co. v. Hudson, 50 Miss. 572; Chicago etc. R. R. Co. v. Patchin, 16 Ill. 198; Bethje v. R. R. Co., 26 Tex. 604; New Orleans etc. R. R. Co. v. Enochs, 42 Miss. 603; Great Western R. R. Co. v. Morthland, 30 Ill. 451; Schneir v. R. R. Co., 40 Iowa, 337; Indianapolis etc. R. R. Co. v. Means, 14 Ind. 30; Walsh v. R. R. Co., 8 Nev. 111; Grand Rapids etc. R. R. Co. v. Judson, 35 Mich. 507; Brown v. R. R. Co., 33 Mo. 309; Lyndsay v. R. R. Co., 27 Vt. 643; Scott v. R. R. Co., 4 Jones, 432; Savannah etc. R. R. Co. v. Geiger, 21 Fla. 669; 58 Am. Rep. 697.

² White v. R. R. Co., 30 N. H. 207; Danner v. R. R. Co., 4 Rich. 330; 55 Am. Dec. 678; Murray v. R. R. Co., 10 Rich. 227; 70 Am. Dec. 219; Roof v. R. R. Co., 4 S. C. 61; Galpin v. R. R. Co., 19 Wis. 604; McCoy v. R. R. Co., 40 Cal. 532; 6 Am. Rep. 623; Smith v. R. R. Co., 35 N. H. 357; Jones v. R. R. Co., 20 S. C. 249.

³ Clark v. R. R. Co., Winst. 109; Pippen v. R. R. Co., 75 N. C. 54; Battle v. R. R. Co., 66 N. C. 343; Home v. R. R. Co., 1 Cold. 72; Georgia etc. R. R. Co. v. Munroe, 49 Ga. 373; Mobile etc. R. R. Co. v. Williams, 53 Ala. 595.

⁴ Gorman v. R. R. Co., 26 Mo. 441; 72 Am. Dec. 220; St. Louis etc. R. R. Co. v. Linder, 39 Ill. 433; 89 Am. Dec. 319; Burlington etc. R. R. Co. v. Brinkham, 14 Neb. 70. And if by reason of its failure to do so, pastureland is rendered unfit for use as such, the owner may recover his loss from the company: Leggett v. R. R. Co., 41 Hun, 80. As to the constitutionality of such statutes, see *post*, Division V., Constitutional Law.

Such statutes are held in a number of cases to be remedial in their nature, and therefore to be liberally construed.¹ The statute is not repealed or nullified by a subsequent law prohibiting domestic animals from running at large, whether local or general in its nature,² nor by a subsequent statute permitting a land-owner along the line of the railway to erect the fence in case of the company's failure so to do, and to charge the latter with the value of it,³ nor from the fact that adjoining land-owners have erected a fence along the line.⁴ The liability exists during the time of construction of the road, and does not for the first time attach when the road is operated.⁵ It includes a lessee of a road.⁶ The term "agents," in the statute, includes the fireman and engineer of the train;⁷ mules and asses come under the term, "cattle and horses."⁸ Cattle "running at large" will include cattle pastured on the close of the owner which was surrounded by a defective fence, and which escaped from there to the railroad track, and were injured.⁹ When the railroad is liable, "unless the injury complained of is occasioned by the willful act of the owner or his agent," merely permit-

¹ *Ohio etc. R. R. Co. v. Brubaker*, 47 Ill. 462; *Rockford etc. R. R. Co. v. Heffin*, 65 Ill. 367; *Tracy v. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 54. *Contra*, holding them to be penal, and to be construed strictly: *Indianapolis etc. R. R. Co. v. Kinney*, 8 Ind. 402; *Bay City R. R. Co. v. Austin*, 21 Mich. 390. The Wisconsin statute contained no provision that a railroad company failing in its duty to fence its track should be liable for injuries to stock resulting from such failure. It was held, however, that the effect of the statute was the same as if it had contained such a provision, on the "general principle that where the law imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose benefit it was imposed for any damages sustained by reason of such ne-

glect": *McCall v. Chamberlain*, 13 Wis. 639.

² *Ewing v. R. R. Co.*, 72 Ill. 25; *Ohio etc. R. R. Co. v. Jones*, 63 Ill. 472; *Chicago etc. R. R. Co. v. Harris*, 54 Ill. 528.

³ *Toledo etc. R. R. Co. v. Pence*, 68 Ill. 528.

⁴ *Louisville etc. R. R. Co. v. White*, 94 Ind. 257.

⁵ *Gardner v. Smith*, 7 Mich. 410; 74 Am. Dec. 722; *Silver v. R. R. Co.*, 78 Mo. 528; 47 Am. Rep. 118.

⁶ *Tracy v. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 54.

⁷ *Suydam v. Moore*, 8 Barb. 358; *R. R. Co. v. Hunt*, 59 Vt. 294.

⁸ *Ohio etc. R. R. Co. v. Brubaker*, 47 Ill. 462; *Toledo etc. R. R. Co. v. Cole*, 50 Ill. 185.

⁹ *Hinman v. R. R. Co.*, 28 Iowa, 491; *Fritz v. R. R. Co.*, 34 Iowa, 337; *Hammond v. R. R. Co.*, 43 Iowa, 168.

ting the stock to run at large is not a willful act within the statute.¹ A railroad is not bound to provide places for stock to leave its track.²

§ 1401. **Who and What within the Statutory Protection.**—The statutes embrace animals injured by the failure to fence, even though not owned by an adjoining proprietor,³ and passengers injured by a collision with cattle on the track through a neglect to properly fence,⁴ and injuries to crops caused by the cattle escaping through the defective fence into another's field.⁵ But they do not extend to an injury to an employee of the railroad,⁶ or to children trespassing on the track.⁷ Compliance with the statute does not relieve the company from liability for

¹ *Stewart v. R. R. Co.*, 32 Iowa, 561.

² *Gilman v. R. R. Co.*, 62 Iowa, 299.

³ *Indianapolis etc. R. R. Co. v. Townsend*, 10 Ind. 38; *Hart v. R. R. Co.*, 12 Ind. 478; *New Albany etc. R. R. Co. v. Tilton*, 12 Ind. 3; 74 Am. Dec. 195; *Indianapolis etc. R. R. Co. v. McKinney*, 24 Ind. 283; *Gilmore v. R. R. Co.*, 60 Me. 237; *Rhodes v. R. R. Co.*, 5 Hun, 344; *McCall v. Chamberlain*, 13 Wis. 640; *Marietta etc. R. R. Co. v. Stephenson*, 24 Ohio St. 48; *Corwin v. R. R. Co.*, 13 N. Y. 42; overruling *Brooks v. R. R. Co.*, 13 Barb. 594; *Browne v. R. R. Co.*, 12 Gray, 55; 71 Am. Dec. 736; *Russell v. Hanley*, 20 Iowa, 219; 88 Am. Dec. 535. In other cases it has been held that the statute applies only to such cattle as stray directly from the land of the owners to the railroad track, and that if they are trespassing on the abutting premises, and escape from there to the track and are injured, the railroad is not liable: *Walsh v. R. R. Co.*, 8 Nev. 111; *McDonnell v. R. R. Co.*, 115 Mass. 564; *Maynard v. R. R. Co.*, 115 Mass. 458; *Eames v. R. R. Co.*, 98 Mass. 560; 96 Am. Dec. 676; *Pittsburg etc. R. R. Co. v. Methven*, 21 Ohio St. 586; *Jackson v. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *Bemis v. R. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339; *Cornwall v. R. R. Co.*, 28 N. H. 161; *Woolson v. R. R.*

Co., 19 N. H. 267; *Chapin v. R. R. Co.*, 39 N. H. 53; 75 Am. Dec. 207.

⁴ *Blair v. R. R. Co.*, 20 Wis. 254, the court saying: "The statute was not enacted for the paltry purpose of determining who should bear the pecuniary burden of building and maintaining division fences, as between railroad companies and the adjoining proprietors of land; nor to fix the liability of such companies for injuries occasioned to domestic animals before such fence should be built; but the great object of its enactment was the increased safety of the lives and limbs of passengers which would be secured by a strict observance of its provisions."

⁵ *Holden v. R. R. Co.*, 30 Vt. 298; *Comings v. R. R. Co.*, 48 Mo. 512; *Smith v. R. R. Co.*, 38 Iowa, 518; *Donald v. R. R. Co.*, 44 Iowa, 157; *Dean v. R. R. Co.*, 22 N. H. 316; *Trice v. R. R. Co.*, 49 Mo. 440. See, *contra*, *Clark v. R. R. Co.*, 36 Mo. 203, decided under an early statute of that state since amended.

⁶ *Langlois v. R. R. Co.*, 19 Barb. 364.

⁷ *Fitzgerald v. R. R. Co.*, 29 Minn. 336; 43 Am. Rep. 212; *Walkenhauer v. R. R. Co.*, 3 McCrary, 553. *Contra*, *Schmidt v. R. R. Co.*, 23 Wis. 186; 99 Am. Dec. 158; *Hayes v. R. R. Co.*, 111 U. S. 228; *Keyser v. R. R. Co.*, 56 Mich. 559; 56 Am. Rep. 405.

injuries resulting from negligence or misconduct in other ways.¹

§ 1402. **At What Places Fence not Required.**—At certain places, such as where highways cross it, and where it runs along a street, or at the stations of the line, the railroad is not obliged to fence. The statutes of the states in some instances specially except these places, but in the absence of statute, the courts make a similar exception.² A railroad need not fence where it would hinder the free use of its property, or incommode individuals in the use of their property, or interfere with the rights of the public;³ as, for example, at a place used for switching and loading and unloading freight, where a fence would seriously interfere with its business or the safety of its employees;⁴ or where the fence would exclude land-owners from their private passage to a highway.⁵ But the company has the burden of showing that the road could not be fenced at the place.⁶ Where injuries occur at places where the railroad companies may not legally fence their tracks, the rights and liabilities of the parties are to be determined upon the general principles of the law of negligence, without regard to the statute concerning fences.⁷

§ 1403. **In Cities, Towns, and Villages.**—In Missouri, railroads are not required to fence their tracks within the

¹ *New Albany R. R. Co. v. McNamara*, 11 Ind. 543; *Ind. etc. R. R. Co. v. McBrown*, 46 Ind. 229; *McDowell v. R. R. Co.*, 37 Barb. 196.

² *Indianapolis etc. R. R. Co. v. Oestel*, 20 Ind. 231; *Louisville etc. R. R. Co. v. Francis*, 58 Ind. 389; *Rogers v. R. R. Co.*, 26 Iowa, 558; *Davis v. R. R. Co.*, 26 Iowa, 549; *Durand v. R. R. Co.*, 26 Iowa, 559; *Indianapolis etc. R. R. Co. v. Candle*, 60 Ind. 112; *Verhusen v. R. R. Co.*, 53 Wis. 687; *Ind. etc. R. R. Co. v. Leak*, 89 Ind. 596.

³ *Cincinnati etc. R. R. Co. v. Wood*, 82 Ind. 593.

⁴ *Evansville etc. R. R. Co. v. Willis*, 93 Ind. 507.

⁵ *Croy v. R. R. Co.*, 97 Ind. 126.

⁶ *Louisville etc. R. R. Co. v. Clark*, 94 Ind. 111.

⁷ *Thompson on Negligence*, 520, citing numerous cases; and see *Missouri etc. R. R. Co. v. Wilson*, 28 Kan. 637. The Missouri statute raises an inference of negligence when the stock is injured at a place where the law does not require the road to be fenced, which must be rebutted by the defendant; *Edwards v. R. R. Co.*, 66 Mo. 571; *Elliott v. R. R. Co.*, 66 Mo. 683; *Iba v. R. R. Co.*, 45 Mo. 470; *Ells v. R. R. Co.*, 48 Mo. 231. But this rule does not apply to places where it is unlawful for the company to maintain fences; *Elliott v. R. R. Co.*, 66 Mo. 683.

limits of incorporated cities and towns;¹ in Illinois the same exception is made as to cities and incorporated towns and villages; and in Iowa, there is an implied exception in the operation of the statute as to that portion of a railroad track which lies within the limits of cities and villages.² "Any small assemblage of houses for dwelling or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys, or not."³ The presumption is that the houses compose a village; if an animal is killed beyond the houses, the presumption is that it is killed beyond the village; if the town extends beyond the houses, the defendant should show the fact.⁴ A railroad is not excused from fencing by the mere abuttal of its right of way on a town plat, no town, streets, or alleys crossing such right of way.⁵

§ 1404. **Highway Crossings and Highways.**—For obvious reasons, the railroad is not obliged to fence at places where its track either is crossed by or runs along a public highway.⁶ The statutory rule that railroads need not fence at public crossings applies both to highways *de facto* and *de jure*.⁷ But where the highways run by the side of the railroad track, the latter should be fenced.⁸

§ 1405. **Public Places.**—A railroad is not obliged to fence its road at a public place used as such by the pub-

¹ *Edwards v. R. R. Co.*, 66 Mo. 571; *Cousins v. R. R. Co.*, 66 Mo. 572; *Elliot v. R. R. Co.*, 66 Mo. 683; *Meyer v. R. R. Co.*, 35 Mo. 352.

² *Davis v. R. R. Co.*, 26 Iowa, 549; *Rogers v. R. R. Co.*, 26 Iowa, 558; *Blanford v. R. R. Co.*, 71 Iowa, 310; 60 Am. Rep. 795.

³ *Illinois etc. R. R. Co. v. Williams*, 27 Ill. 49; *Toledo etc. R. R. Co. v. Spangler*, 71 Ill. 568; *Chicago etc. R. R. Co. v. Rice*, 71 Ill. 567.

⁴ *Ohio etc. R. R. Co. v. Irvin*, 27 Ill. 178.

⁵ *Kirkland v. R. R. Co.*, 82 Mo. 466.

⁶ *Louisville etc. R. R. Co. v. Francis*, 58 Ind. 389; *Soward v. R. R. Co.*, 30 Iowa, 551; *Atchison etc. R. R. Co. v. Griffiths*, 28 Kan. 539; *Sullivan v. R. R. Co.*, 72 Mo. 195.

⁷ *Luckie v. R. R. Co.*, 76 Mo. 639.

⁸ *Indianapolis etc. R. R. Co. v. McKinney*, 24 Ind. 283; *Indianapolis etc. R. R. Co. v. Guard*, 24 Ind. 222; 87 Am. Dec. 327; *Jeffersonville etc. R. R. Co. v. Sweeney*, 32 Ind. 430.

lic.¹ In some cases it is held that if the place is in law a public place, the company need not fence, even though the place is not in public use.² In others it is held that although it be in law a public place, still, if for any reason it be not used, and is not likely to be used, as such, by the public, the road must be fenced.³ Where a highway has not been in a condition for use by the public, and has not been used for thirty-six years, the presumption of its abandonment is justified, the right to its full use by the owner is restored, and the duty to fence is imposed on a railroad company using a portion of it for its track.⁴ But a mere non-user of a highway by the traveling public during a period of two years is not sufficient to raise a presumption of abandonment, and does not impose the duty of fencing upon the railroad.⁵ A railroad is not obliged to fence its depot-grounds.⁶ It is not bound to fence its track, where the effect would be to cut it off from the use of some of its own property, though not in present use,—as machine-shops, wood-sheds, etc.⁷

§ 1406. **What Fence Sufficient.**—A fence sufficient under the statutes is one which will keep stock out.⁸ Thus

¹ *Ewing v. R. R. Co.*, 72 Ill. 25; *Cleveland etc. R. R. Co. v. Crossley*, 36 Ind. 371; *Tracy v. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 54; *Cleveland etc. R. R. Co. v. McConnell*, 26 Ohio St. 57; *Flint etc. R. R. Co. v. Lull*, 28 Mich. 510; *Pittsburgh etc. R. R. Co. v. Ehrhart*, 36 Ind. 119; *Pittsburgh etc. R. R. Co. v. Bowyer*, 45 Ind. 496; *Ohio etc. R. R. Co. v. Rowland*, 50 Ind. 349; *Lloyd v. R. R. Co.*, 49 Mo. 199; *Morris v. R. R. Co.*, 58 Mo. 78; *Swearingen v. R. R. Co.*, 64 Mo. 73; *Robertson v. R. R. Co.*, 64 Mo. 412; *Brace v. R. R. Co.*, 27 N. Y. 269; *McKinley v. R. R. Co.*, 47 Iowa, 76.

² *Meyer v. R. R. Co.*, 35 Mo. 352; *Elliott v. R. R. Co.*, 66 Mo. 683.

³ *Whitewater R. R. v. Quick*, 30 Ind. 384; *Toledo etc. R. R. Co. v. Cary*, 37 Ind. 172; *Toledo etc. R. R. Co. v. Howell*, 38 Ind. 447.

⁴ *Jeffersonville etc. R. R. v. O'Connor*, 37 Ind. 96.

⁵ *Ind. etc. R. R. Co. v. Gapen*, 10 Ind. 292.

⁶ *Davis v. R. R. Co.*, 26 Iowa, 550; *Smith v. R. R. Co.*, 34 Iowa, 506; *Galena etc. R. R. Co. v. Griffin*, 31 Ill. 303; *Indianapolis etc. R. R. Co. v. Oestel*, 20 Ind. 231; *Cleveland v. R. R. Co.*, 35 Iowa, 220; *Plaster v. R. R. Co.*, 35 Iowa, 449; *Latty v. R. R. Co.*, 38 Iowa, 250; *Lloyd v. R. R. Co.*, 49 Mo. 199; *Swearingen v. R. R. Co.*, 64 Mo. 73; *Robertson v. R. R. Co.*, 64 Mo. 412; *Packard v. R. R. Co.*, 30 Iowa, 474.

⁷ *Indianapolis etc. R. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville etc. R. R. Co. v. Beatty*, 36 Ind. 15.

⁸ *Halverson v. R. R. Co.*, 32 Minn. 88.

a wire fence will do. A bluff, a hedge, a trench, a wall, a trestle, or the like, may be of equal security with the statutory defined lawful fence; and if so found in fact, it would, under the statute, be a lawful fence.¹ Where the statutory fence will not keep out hogs, a railroad is not obliged to erect a fence which will be safe against hogs.²

§ 1407. Care Required in Maintenance of Fences.—
Notice of Defects.—In the case of a defect in a fence, the company must have notice of it, or such a time must elapse as to raise the presumption of notice, and what such a time must be depends upon the circumstances of the particular case.³ It is not bound to keep a patrol at night along its road to see that the fence is not broken down.⁴ The company is not bound to see a defect the moment it occurs; it is entitled to have a reasonable time to find it out.⁵ If the defect is in the original construction of the fence, this charges the defendant with notice from the beginning.⁶ Thus the doctrine that a reasonable time must elapse after a gate or a fence gets out of repair in which a railroad company may discover its condition does not apply where the gate never had such a fastening as the law required.⁷ And it is no excuse that it was erected by another person by contract with the company.⁸ But where by contract with the railroad the fence is to be erected by the plaintiff, and he fails in his performance of it, he cannot recover for an injury to his stock resulting from a defect consequent upon such fail-

¹ Hilliard v. R. R. Co., 37 Iowa, 442.

² Atchison etc. R. R. Co. v. Yates, 21 Kan. 613.

³ Toledo etc. R. R. Co. v. Cohen, 44 Ind. 444; Cleveland etc. R. R. Co. v. Brown, 45 Ind. 91; McDowell v. R. R. Co., 37 Barb. 196; Perry v. R. R. Co., 36 Iowa, 102.

⁴ Illinois etc. R. R. Co. v. Dickerson, 27 Ill. 55; 79 Am. Dec. 394.

⁵ Chicago etc. R. R. Co. v. Harris, Ill. 528; Bell v. R. R. Co., 64 Iowa,

321; Brown v. R. R. Co., 21 Wis. 37; 91 Am. Dec. 456; Toledo etc. R. R. Co. v. Elder, 45 Mich. 329; Fritz v. R. R. Co., 61 Iowa, 323; Young v. R. R. Co., 82 Mo. 427.

⁶ Hammond v. R. R. Co., 43 Iowa, 168.

⁷ Duncan v. R. R. Co., 91 Mo. 68.

⁸ Gill v. R. R. Co., 27 Ohio St. 240; New Albany etc. R. R. Co. v. Maiden, 12 Ind. 10; Shepard v. R. R. Co., 35 N. Y. 641.

ure. He is guilty of contributory negligence. But if he originally erected the fence under such a contract, and it was accepted by the company and paid for, the company cannot afterwards plead a defective construction as contributory negligence. By the acceptance they assume responsibility for the defect.¹ In the building and maintaining of fences, railroad companies are bound to exercise only ordinary care and diligence.² They are not insurers of the safety of their fences.³ The railroad is not liable for an injury caused to the fence by the wrongful act or negligence of third persons, except where after notice it is guilty of neglect in not repairing it.⁴ That the road was not fenced at other places will not make the company liable for an injury at the place where it is fenced, unless it was the result of such failure.⁵

§ 1408. **Private Crossings.**—In some states the statutes impose on the railroads the duty of erecting gates or bars at private farm-crossings.⁶ And in the absence of statute, it has been held in some cases that the railroad is under the same obligation to erect and maintain gates at private crossings as it is to erect and keep up fences.⁷ In New York the duty of keeping these gates closed and bars up is upon the land-owner for whose convenience they were erected, and who uses them.⁸ A failure in this duty on his part will bar, not only his action, but that of a third person whose cattle stray upon his land

¹ *Norris v. R. R. Co.*, 39 Me. 274; 63 Am. Dec. 621.

² *Lemmon v. R. R. Co.*, 32 Iowa, 151; *Henderson v. R. R. Co.*, 43 Iowa, 620; *Estes v. R. R. Co.*, 63 Me. 309; *Stephenson v. R. R. Co.*, 35 Mich. 323; *Case v. R. R. Co.*, 75 Mo. 668; *Bennet v. R. R. Co.*, 61 Iowa, 355.

³ *Thompson on Negligence*, 524.

⁴ *Chicago etc. R. R. Co. v. Barrie*, 55 Ill. 227; *Henderson v. R. R. Co.*, 43 Iowa, 620; *Toledo etc. R. R. Co. v. Fowler*, 22 Ind. 316; *Russell v. Hanley*, 20 Iowa, 219; 89 Am. Dec. 535;

Perry v. R. R. Co., 36 Iowa, 102; *Toledo etc. R. R. Co. v. Milligan*, 52 Ind. 505; *Hodge v. R. R. Co.*, 27 Hun, 394; *Clardy v. R. R. Co.*, 73 Mo. 576.

⁵ *Brooks v. R. R. Co.*, 13 Barb. 594.

⁶ *Thompson on Negligence*, 525.

⁷ *Russell v. Hanley*, 20 Iowa, 219; 89 Am. Dec. 535; *Hammond v. R. R. Co.*, 43 Iowa, 169; *Henderson v. R. R. Co.*, 43 Iowa, 620; *Perry v. R. R. Co.*, 36 Iowa, 102; *Estes v. R. R. Co.*, 63 Me. 309; *Cleveland etc. R. R. Co. v. Swift*, 42 Ind. 119.

⁸ *Spinner v. R. R. Co.*, 2 Hun, 426.

and are injured in consequence of the defect.¹ But if the gate is used by the company or by its servants in and about the prosecution of their business, and is by them carelessly left open, the company will be liable for an injury ensuing in consequence thereof.² In New York a railroad is by statute permitted to put up gates at farm-crossings for the convenience of the adjoining farmer, and not for the use of itself or others; and when such a gate is used by itself or its customers with its permission, it is required to keep the gate in such a state as will turn away orderly cattle, and if it permits, invites, or shares in such use as, to its knowledge or notice, results in the gate not serving the end of a fence, it fails in its duty. Where it has knowledge that such gate is customarily left open, or where, from the manner of the use of the same, it has notice that such an event is likely to happen, it is in statutory default if it does not see to the closing of it when the use of it is over for the day or a shorter period. Therefore, where plaintiff's cattle at night strayed through a gate in a railroad fence which was, to the knowledge of its servants, used by the customers of the railroad company in doing business with it, and was frequently left open at night, whereby the cattle were run into by the company's trains and killed, it was held that the company was guilty of such default as to render it liable for the loss of the cattle.³

§ 1409. **Cattle-guards.**—The railroad is also obliged to erect cattle-guards at public places, where the road cannot be continuously fenced. Many of the statutes, indeed, provide for their erection and maintenance, but without such provision the duty will be implied.⁴ Such

¹ *Brooks v. R. R. Co.*, 13 Barb. 594.

² *Spinner v. R. R. Co.*, 2 Hun, 426.

³ *Spinner v. R. R. Co.*, 67 N. Y. 153.

⁴ *Thompson on Negligence*, 526; In-

dianapolis etc. R. R. Co. *v. Irish*, 26 Ind. 268; *Union Pac. R. R. Co. v. Harris*, 28 Kan. 206; *Randan v. R. R. Co.*, 69 Iowa, 527; *Wabash etc. R. R. Co. v. Tretts*, 96 Ind. 450.

cattle-guards must be sufficient to keep cattle out, and a failure to maintain them in this condition is negligence.¹ A statute requiring railroads to maintain cattle-guards at road crossings applies as well to streets which are crossed by railroads in villages as to country highways; and the fact that a crossing is near a depot, and that a guard there would inconvenience the company, does not relieve it from the necessity of erecting it.² A railroad is negligent in permitting its cattle-guards to remain filled with snow, so that cattle which have escaped upon a highway without their owner's negligence may pass onto the track and be liable to be killed.³

§ 1410. **Release of Duty to Fence.**—It is lawful for the adjoining owner to release by contract the railroad from its obligation to maintain a fence along his land.⁴ Where the contract is by a covenant in a deed to the right of way, it will bind the grantee, lessee, tenant, etc., of the covenantor,⁵ but only in the same way and to the same extent that the covenantor is bound.⁶ But such a contract cannot affect the right of a stranger whose stock trespassing on the land of the adjoining owner gets on

¹ *Pitts. etc. R. R. Co. v. Eby*, 55 Ind. 567; *Dunnigan v. R. R. Co.*, 18 Wis. 28; 86 Am. Dec. 741; *New Albany etc. R. R. Co. v. Pace*, 13 Ind. 411; *Missouri Pacific R. R. Co. v. Manson*, 31 Kan. 337; *Missouri Pacific R. R. Co. v. Lynch*, 31 Kan. 531. A negligent construction of a cattle-chute is not excused by the fact that it was similar to those "on well-regulated railroads generally": *Allen v. R. R. Co.*, 64 Iowa, 94.

² *Tracy v. R. R. Co.*, 38 N. Y. 433; 98 Am. Dec. 55.

³ *Dunnigan v. R. R. Co.*, 18 Wis. 28; 86 Am. Dec. 741. *Contra*, *Blais v. R. R. Co.*, 34 Minn. 57; 57 Am. Rep. 36.

⁴ *Pittsburgh etc. R. R. Co. v. Smith*, 26 Ohio St. 124; *Indianapolis etc. R. R. Co. v. Petty*, 25 Ind. 413; *Duffy v. R. R. Co.*, 2 Hilt. 496; *Easter v. R. R. Co.*, 14 Ohio St. 48; *Cincinnati etc. R. R. Co. v. Waterson*, 4 Ohio St. 424; *Tower v. R. R. Co.*, 2 R. I. 404; *Indianapolis etc. R. R. Co. v. Petty*, 25 Ind. 413.

nati etc. R. R. Co. v. Waterson, 4 Ohio St. 424; *Tower v. R. R. Co.*, 2 R. I. 404; *Shepard v. R. R. Co.*, 35 N. Y. 641; *Ellis v. R. R. Co.*, 48 Mo. 231; *Terre Haute etc. R. R. Co. v. Smith*, 16 Ind. 102; *Lawton v. R. R. Co.*, 8 Cush. 230; 54 Am. Dec. 753. *Contra*, *New Albany etc. R. R. Co. v. Maiden*, 12 Ind. 10.

⁵ *Duffy v. R. R. Co.*, 2 Hilt. 496; *Easter v. R. R. Co.*, 14 Ohio St. 48; *Cincinnati etc. R. R. Co. v. Waterson*, 4 Ohio St. 424; *Tower v. R. R. Co.*, 2 R. I. 404; *Indianapolis etc. R. R. Co. v. Petty*, 25 Ind. 413.

⁶ *Shepard v. R. R. Co.*, 35 N. Y. 641. A verbal contract is not a covenant running with the land which will bind the maker's lessee: *St. Louis etc. R. R. Co. v. Todd*, 36 Ill. 409; *Wilder v. R. R. Co.*, 65 Me. 333; 20 Am. Rep. 698.

the track through the failure of the railroad to fence.¹ A release may be implied as well as by express words. The refusal of the land-owner to permit the company to erect bars at his farm-crossing, as required by the statute, is an excuse for their omission to build the fence, notwithstanding an express agreement for the erection of gates.² So it has been held that where damages were assessed and paid to the land-owner through whose premises the railroad passed, it would be presumed that the expense of building and maintaining a fence along the line of road was included in the damages; and if the land-owner's cattle were injured in consequence of defects in the fence, either before or after the passage of the statute requiring the company to fence, there could be no recovery.³ The burden of proving an averment that there was no contract on the part of the plaintiff to fence the track is not upon the plaintiff, but the defendant must disprove it.⁴

ILLUSTRATIONS. — A lane leading from the highway to the plaintiff's residence crossed the railroad track, and at each end of the lane were gates, which, with the inclosing fences, were maintained by the plaintiff. *Held*, in an action by him for killing his cow at the crossing, that the company were justified in assuming that he preferred the open crossing; and that he could not recover: *Tyson v. R. R. Co.*, 43 Iowa, 207. A was B's tenant of a farm adjoining a railroad. B contracted with the railroad company to build and maintain a good and sufficient fence between the farm and the track. A knew of the contract, and repaired this fence, and kept stock upon the farm. A horse broke through the fence, and was killed by a train, as were two mules which followed him. The fence was strong enough to keep in ordinary stock. *Held*, that A had no ground of action against the company: *St. Louis etc. R. R. Co. v. Washburn*, 97 Ill. 253. By agreement between the owner of land through which a railroad passed and the company, the owner became bound to maintain a certain fence, which the company for its own purposes at one time took down and put up in a

¹ *Corwin v. R. R. Co.*, 13 N. Y. 49; *Talmadge v. R. R. Co.*, 13 Barb. 493; *Berry v. R. R. Co.*, 65 Mo. 172. *Contra*, *Indianapolis etc. R. R. Co. v. Petty*, 25 Ind. 413.

² *Hurd v. R. R. Co.*, 25 Vt. 117.

³ *Johnson v. R. R. Co.*, 19 Wis. 137;

⁴ *Great West. R. R. Co. v. Bacon*, 30 Ill. 347; 83 Am. Dec. 199.

different way, to which the owner might have objected, but did not. He afterwards allowed the fence to get out of repair, and his cattle got upon the track and were killed. *Held*, that he could not be heard to complain that the company failed to restore the fence to its original condition: *Pittsburgh etc. R. R. Co. v. Heiskell*, 38 Ohio St. 666.

§ 1411. **Contributory Negligence — As to Fences.** — Even under the statutes making railroads absolutely liable for injuries to animals caused by their failure to fence their tracks, the contributory negligence of the owner is a good defense.¹ The following have been held to amount to contributory negligence on the part of the owner: Any act on his part contributing to the defect in the fence or permitting the cattle to escape;² failing to notify the railroad of a defect in the fence known to him;³ failing to repair a division fence which he is under a legal duty to repair.⁴

§ 1412. **Contributory Negligence — As to Permitting Cattle to Run at Large.** — In some cases it is held that there is no obligation on the part of the company to fence against cattle wrongfully in the highway or an adjoining close, and that the owner of such cattle can recover nothing, under the statute, for their injury or destruction by

¹ *Hance v. R. R. Co.*, 26 N. Y. 428; *Munger v. R. R. Co.*, 4 N. Y. 350; 53 Am. Dec. 384; 5 Denio, 255; *Murray v. R. R. Co.*, 4 Keyes, 274; *Pittsburgh etc. R. R. Co. v. Methven*, 21 Ohio St. 586; *Rockford etc. R. R. Co. v. Irish*, 72 Ill. 405; *Browne v. R. R. Co.*, 12 Gray, 55; 71 Am. Dec. 736; *Eames v. R. R. Co.*, 98 Mass. 560; 96 Am. Dec. 676; *Williams v. R. R. Co.*, 5 Ind. 114; *Indianapolis etc. R. R. Co. v. Shimer*, 17 Ind. 295. *Contra*, *Jeffersonville etc. R. R. Co. v. Ross*, 37 Ind. 549; *Mead v. R. R. Co.*, 52 Vt. 278.

² *Toledo etc. R. R. Co. v. Thomas*, 18 Ind. 215; *Indianapolis etc. R. R. Co. v. Petty*, 25 Ind. 414; *Koutz v. R. R. Co.*, 54 Ind. 515; *Illinois etc. R. R. Co. v. McKee*, 43 Ill. 120; *Eames v. R. R. Co.*, 98 Mass. 560; 96 Am. Dec.

676; *Duffy v. R. R. Co.*, 2 Hilt. 496; *Illinois etc. R. R. Co. v. Arnold*, 47 Ill. 173; *Indianapolis etc. R. R. Co. v. 17 Ind. 295*; *Hook v. R. R. Co.*, 58 Shimer, N. H. 251.

³ *Poler v. R. R. Co.*, 16 N. Y. 476; *Chicago etc. R. R. Co. v. Sierer*, 60 Ill. 295; *Chicago etc. R. R. Co. v. Buck*, 14 Ill. App. 394. Unless the defect was in the original construction of the fence: *Hammond v. R. R. Co.*, 43 Iowa, 169. But to fail to repair the fence is not contributory negligence: *Texas etc. R. R. Co. v. Young*, 60 Tex. 201; *Cleveland etc. R. R. Co. v. Scudder*, 40 Ohio St. 173; *Busby v. R. R. Co.* 81 Mo. 43.

⁴ *Sandusky etc. R. R. Co. v. Sloan*, 27 Ohio St. 341.

the cars of the company.¹ But in others the rule is, that the railroad company cannot avoid liability for injuries to stock in consequence of their failure to comply with the provisions of the statute, on the ground that the owner of the stock has been guilty of negligence in permitting it to stray at large, because the statute imposes a public duty which is superior to any individual interest.² A person is not guilty of contributory negligence in pasturing his cattle on his own field, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He cannot be deprived of the proper use of his property by the failure of the railroad company to perform its duty.³ But this applies only to the fence which the railroad by statute is bound to repair. If the plaintiff's fence is burned by sparks from a passing engine, there is no obligation upon the railroad company to repair the same. If the plaintiff's horse escapes through the breach thus made, and is killed, the company is not liable for damages. It is negligence for him to leave the

¹ *McDonnell v. R. R. Co.*, 115 Mass. 564; *Giles v. R. R.* 55 N. H. 552; *Mayberry v. R. R. Co.*, 47 N. H. 391; *Chapin v. R. R. Co.*, 39 N. H. 564; 75 Am. Dec. 237; *Towns v. R. R. Co.*, 21 N. H. 364; *Trow v. R. R. Co.*, 24 Vt. 488; 58 Am. Dec. 191; *Wilder v. R. R. Co.*, 65 Me. 333; 20 Am. Rep. 698; *Woolson v. R. R. Co.*, 19 N. H. 267; *Perkins v. R. R. Co.*, 29 Me. 307; 50 Am. Dec. 589; *Jackson v. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246; *Knight v. R. R. Co.*, 24 Ind. 402; *Wabash etc. R. R. v. Nice*, 99 Ind. 152.

² *Corwin v. R. R. Co.*, 13 N. Y. 42; *Sheaf v. R. R. Co.*, 2 Thomp. & C. 388; *Fanning v. R. R. Co.*, 2 Thomp. & C. 585; *McDowell v. R. R. Co.*, 37 Barb. 195; *Rhodes v. R. R. Co.*, 5 Hun, 344; *Duffy v. R. R. Co.*, 2 Hilt. 496; *Munch v. R. R. Co.*, 29 Barb. 647; *Congdon v. R. R. Co.*, 56 Vt. 370; 48 Am. Rep. 793; *Cressey v. R. R. Co.*, 59 N. H. 564; 47 Am. Rep. 227; *B. & M. R. R. Co. v. Webb*, 18 Neb. 215; 53 Am. Rep. 809; *Chicago etc.*

R. R. Co. v. Goss, 17 Wis. 428; 84 Am. Dec. 755; *Wilder v. R. R. Co.*, 65 Me. 332; 22 Am. Rep. 698; *Flint etc. R. R. Co. v. Lull*, 28 Mich. 510, the court saying: "If contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railroad company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own grounds in the vicinity of the road; so that if he did what but for the neglect of the company it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."

³ *Shepard v. R. R. Co.*, 35 N. Y. 644; *McCoy v. R. R. Co.*, 40 Cal. 532; 6 Am. Rep. 623; *Rogers v. R. R. Co.*, 1 Allen, 16.

horse in the pasture thus made insecure. He may recover in an action for damages to the fence, but has no right to abandon the rest of his property, and charge the railroad company with the consequences.¹ One who, knowing that a severe storm on Saturday had prostrated fences, on Monday evening turned his cattle upon uninclosed lands without inquiry as to whether the railroad fences abutting thereon were uninjured was guilty of such contributory negligence as would defeat his recovery for injuries received by such cattle on the railroad track.²

§ 1413. What Kinds of Injuries to Cattle are within Statute.—Where the statute gives damages where the animal is “killed or injured” by a railroad train, it seems that the injury to be recovered for must be one caused by actual contact with the locomotive or cars.³ In Iowa the statute gives a remedy for “stock injured or killed by reason of the want of such fence,” and it is held that if the stock got upon the track through a defect in the fence, and injury or death resulted from their alarm and attempts to escape, the company is liable.⁴ The Kansas statute makes railroad companies liable for injuries to stock “by the engines or cars on such railroad, or in any other manner in operating such railroad.” This is held to include injuries inflicted in removing cattle (which came upon the track through a defect in the fence) from a bridge in which they had become entangled upon the approach of a train.⁵

ILLUSTRATIONS.—By a gate left open in a wire fence inclosing defendant's track plaintiff's horses escaped onto the track, and, becoming frightened by a train, ran against the fence

¹ *Terry v. R. R. Co.*, 22 Barb. 575.

² *Carey v. R. R. Co.*, 61 Wis. 71.

³ *Lafferty v. R. R. Co.*, 44 Mo. 292; *Moshier v. R. R. Co.*, 8 Barb. 428; *Indianapolis etc. R. R. Co. v. McBrown*, 46 Ind. 229; *Peru etc. R. R. Co. v. Hasket*, 10 Ind. 409; 71 Am Dec. 335; *Ohio etc. R. R. Co. v. Cole*, 41 Ind. 331;

Louisville etc. R. R. Co. v. Smith, 58 Ind. 575; *Baltimore etc. R. R. Co. v. Thomas*, 60 Ind. 107; *Knight v. R. R. Co.*, 99 N. Y. 25; *Siebert v. R. R. Co.*, 72 Mo. 565.

⁴ *Young v. R. R. Co.*, 44 Iowa, 172.

⁵ *Atchison etc. R. R. Co. v. Edwards*, 20 Kan. 531.

and were injured. *Held*, that the leaving of the gate open was the proximate cause of the injury: *Savage v. R. R. Co.*, 31 Minn. 419. By reason of the neglect of a railroad to properly maintain a fence, plaintiff's mule got upon the track, and put his foot into a small hole in the ground between two ties, thus breaking his leg. *Held*, that the railroad company could not be made responsible: *Nelson v. R. R. Co.*, 30 Minn. 74.

§ 1414. **Injuries to Railroad.**—The owner of cattle may be liable to an action by the railroad; as where he permits them to stray upon the track, whereby a train is thrown off, and property is damaged.¹

ILLUSTRATIONS.—Plaintiff's intestate was a fireman employed on a railroad, and while engaged in running a freight train, struck a steer belonging to defendant, which had strayed on the track; the engine and tender were thrown from the track, and plaintiff's intestate so injured that he died. The right of way at the place of the injury was owned in fee-simple by the railroad company, who had obtained a deed therefor from the defendant, the latter owning the land on both sides of the right of way. The railroad was unfenced. Defendant was in the habit of turning his cattle loose on his own lands, and they frequently strayed on and across the railroad track. *Held*, that plaintiff had no cause of action against the defendant: *Sherman v. Anderson*, 27 Kan. 331; 41 Am. Rep. 414.

§ 1415. **Law and Fact.**—The question whether or not a railroad is obliged to fence at a particular place is one of law for the court, and not for the jury;² as, for example, as to what are "depot-grounds."³ But the following are questions of fact for the jury, viz.: Whether or not the company has securely fenced its road at a particular place; or whether the injury occurred at a particular place, where the company is bound by law to maintain a fence;⁴ and whether or not the injury occurred in consequence of the defect.

¹ *Hannibal etc. R. R. Co. v. Kenney*, 41 Mo. 271; *Housatonic etc. R. R. Co. v. Knowles*, 30 Conn. 313; *Annapolis etc. R. R. Co. v. Baldwin*, 60 Md. 88; 45 Am. Rep. 711.

² *Illinois etc. R. R. Co. v. Whalen*, 42 Ill. 396; *Chicago etc. R. R. Co. v. Engle*, 76 Ill. 318; *Indianapolis etc. R.*

R. Co. v. Oestel, 20 Ind. 231; *Toledo etc. R. R. Co. v. Cory*, 39 Ind. 218.

³ *Blair v. R. R. Co.*, 20 Wis. 254; *Davis v. R. R. Co.*, 26 Iowa, 549.

⁴ *Estes v. R. R. Co.*, 63 Me. 309; *Mumpower v. R. R. Co.*, 59 Mo. 246; *Toledo etc. R. R. Co. v. Cory*, 39 Ind. 218.

§ 1416. **Pleading.**—The facts upon which the statutory liability arises should be set out.¹ But an express averment that the injury was caused by the failure of defendant to maintain fences is not necessary; an allegation warranting that inference is sufficient.² It is not essential to state that the plaintiff was not guilty of contributory negligence.³ Allegations of negligence are unnecessary and irrelevant where the cause of action as stated is complete under the statute.⁴ Where the declaration shows a cause of action at common law, and the evidence shows a state of facts entitling the plaintiff to recover, if at all, under the statute, he cannot recover.⁵ In order to entitle the plaintiff to recover at all, the declaration must be complete, either under the statute or at common law.⁶ In Illinois, a declaration averring that defendant failed to fence its road, and that it so carelessly ran, conducted, and directed its train that it struck and killed the plaintiff's horse, was held to be good, either as a declaration under the statute or at common law.⁷ The killing or injury of animals at different times is each a separate and distinct cause of action, which should be stated in separate paragraphs of the complaint. If the complaint indicates but one cause of action, the plaintiff will be confined in his evidence to a single cause of action.⁸

¹ *Jeffersonville etc. R. R. Co. v. Lyon*, 55 Ind. 477; *Mumpower v. R. R. Co.*, 59 Mo. 245; *Smith v. R. R. Co.*, 35 N. H. 357; *Norton v. R. R. Co.*, 48 Mo. 387; *Cecil v. R. R. Co.*, 47 Mo. 246; *Bigelow v. R. R. Co.*, 48 Mo. 510; *Rockford etc. R. R. Co. v. Phillips*, 66 Mo. 548; *Kansas Pacific R. R. Co. v. Taylor*, 17 Kan. 566.

² *Bowen v. R. R. Co.*, 75 Mo. 426; *Belcher v. R. R. Co.*, 75 Mo. 514.

³ *Jeffersonville etc. R. R. Co. v. Lyon*, 55 Ind. 477; *Toledo etc. R. R. Co. v. Harris*, 49 Ind. 119.

⁴ *Cary v. R. R. Co.*, 60 Mo. 209; *Crutchfield v. R. R. Co.*, 64 Mo. 255; *Rockford etc. R. R. Co. v. Lynch*, 67 Ill. 149; *Collins v. R. R. Co.*, 65 Mo. 230; *Edwards v. R. R.* 66 Mo. 567.

⁵ *Terre Haute etc. R. R. Co. v. Augustus*, 21 Ill. 186; *Luckie v. R. R. Co.*, 67 Mo. 245.

⁶ *Calvert v. R. R. Co.*, 34 Mo. 242; *Garner v. R. R. Co.*, 34 Mo. 235; *Aubuchon v. R. R. Co.*, 52 Mo. 522; *Smith v. R. R. Co.*, 35 N. H. 357; *Cooley v. Brainard*, 38 Vt. 394; *Indianapolis etc. R. R. Co. v. Sparr*, 15 Ind. 440.

⁷ *Chicago etc. R. R. Co. v. Magee*, 60 Ill. 529.

⁸ *Jeffersonville etc. R. R. Co. v. Brevoort*, 30 Ind. 325; *Indianapolis etc. R. R. Co. v. Kercheval*, 24 Ind. 139; *Indianapolis etc. R. R. Co. v. Elliott*, 20 Ind. 430.

There cannot be a recovery in the same action for the killing of a horse and an injury to the harness.¹ The duty of the defendant to fence or otherwise guard its tracks must be averred by showing the facts upon which the duty arose.² The petition must state accurately the facts upon which a recovery is asked. Thus an allegation that the fence was defective will not support evidence that a gate was left open.³ An allegation that the defendant failed to construct cattle-guards will not support a recovery for failing to fence.⁴ Where the provisions of the statute are subject to exceptions, these exceptions must be negatived;⁵ as that the stock was not killed within the limits of a corporate town.⁶ In actions before justices of the peace, the technical rules of pleading are not enforced, but the statement of the cause of action usually required must be sufficiently explicit to apprise the defendant of the nature of the injury, and whether it is under the statute or at common law.⁷

§ 1417. Burden of Proof—Evidence of Negligence.—

The burden of proof that the defendant is within the provisions of the statute is on the plaintiff,⁸ except as to

¹ Dillard v. R. R. Co., 58 Mo. 70.

² Balt. etc. R. R. Co. v. Wilson, 31 Ohio, 555.

³ Illinois etc. R. R. Co. v. McKee, 43 Ill. 120.

⁴ Parker v. R. R. Co., 16 Barb. 315.

⁵ Where they are contained in the enacting clause: Chicago etc. R. R. Co. v. Carter, 20 Ill. 390; Ohio etc. R. R. Co. v. Brown, 23 Ill. 94; Galena etc. R. R. Co. v. Sumner, 24 Ill. 631; Great Western R. R. Co. v. Bacon, 30 Ill. 347; 83 Am. Dec. 199; Toledo etc. R. R. Co. v. Lavery, 71 Ill. 522; Great Western R. R. Co. v. Hanks, 36 Ill. 281; Illinois etc. R. R. Co. v. Williams, 27 Ill. 48. *Aliter* where they are in another section: Chicago etc. R. R. Co. v. Carter, 20 Ill. 390; Toledo etc. R. R. Co. v. Lavery, 71 Ill. 522.

⁶ Schulte v. R. R. Co., 76 Mo. 324.

⁷ Thompson on Negligence, 536; Ohio etc. R. R. Co. v. Miller, 46 Ind. 215; Toledo etc. R. R. Co. v. Reed, 23 Ind. 101; Toledo etc. R. R. Co. v. Lurch, 23 Ind. 10.

⁸ Indianapolis etc. R. R. Co. v. Means, 14 Ind. 30; Indianapolis etc. R. R. Co. v. Penry, 48 Ind. 128; Rogers v. R. R. Co., 1 Allen, 16; Toledo etc. R. R. Co. v. Logan, 71 Ill. 191; Baxter v. R. R. Co., 102 Mass. 384; Kansas etc. R. R. Co. v. Ball, 19 Kan. 535; Morrison v. R. R. Co., 32 Barb. 569; Indianapolis etc. R. R. Co. v. Stallman, 15 Ind. 205; Toledo etc. R. R. Co. v. Pence, 68 Ill. 525; Jeffersonville etc. R. R. Co. v. O'Connor, 37 Ind. 95; Ewing v. R. R. Co., 72 Ill. 25; Comstock v. R. R. Co., 32 Iowa, 376; Flint etc. R. R. Co. v. Lull, 28 Mich. 510.

matters peculiarly within the defendant's knowledge.¹ So the plaintiff must prove all the necessary facts. If it is a necessary allegation of the petition that the animals came upon the track at the place where the fence was defective, it must be shown in evidence that such was the fact. It is not sufficient to show that the fence on each side of the road was poor and defective.² Evidence that the fence was defective on the 22d of the month is not sufficient to show that it was defective on the 20th, the date of the accident, and thereby to charge the company, without showing negligence.³ Where an animal is killed by a train at a public crossing, proof that the employees in charge of the train failed to ring the bell or sound the whistle, as required by the statute, is not sufficient to authorize a verdict against the company. It must be further shown by facts and circumstances that such neglect caused the injury. The failure to give the signals is negligence, but having shown that fact, it must be supplemented by testimony to show that the negligence caused the damage, and the burden of proof is upon the plaintiff to show that such negligence caused the injury.⁴

§ 1418. Measure of Damages.—Where the stock is killed or rendered entirely valueless, the measure of damages is its value at the time of the injury.⁵ Where the animal killed or injured has a value as meat, the owner must dispose of it as such to the best advantage, and the measure of damage is then the value of the cattle as injured and their value before the injury.⁶ The owner, however, is only to be charged with the net proceeds of

¹ Great Western R. R. Co. v. Bacon, 30 Ill. 347; 83 Am. Dec. 199.

² Wabash etc. R. R. Co. v. Brown, 2 Ill. App. 516.

³ Illinois etc. R. R. Co. v. Whalen, 42 Ill. 396.

⁴ Holman v. R. R. Co., 62 Mo. 562.

⁵ Lapine v. R. R. Co., 20 La. Ann. 158; Indianapolis etc. R. R. Co. v.

Mustard, 34 Ind. 51; Toledo etc. R. R. Co. v. Johnston, 74 Ill. 83; Toledo etc. R. R. Co. v. Arnold, 43 Ill. 418; Madison etc. R. R. Co. v. Herod, 10 Ind. 2; Ohio etc. R. R. Co. v. Hays, 35 Ind. 173.

⁶ Illinois etc. R. R. Co. v. Finnigan, 21 Ill. 646.

such cattle, after deducting a fair allowance for the time and trouble required in effecting a sale.¹ If the cattle, when discovered, are mangled, swollen, and bruised, the plaintiff is not required to dispose of their bodies to entitle him to recover their full value.² If animals killed are used or given away by plaintiff, the value of the carcass should be deducted.³ But it is not necessary to a recovery by the owner of an animal maimed that he should surrender it to the company, but he can recover only to the extent of the injury done.⁴ The plaintiff is not entitled to interest on the value of the stock from the date of the injury.⁵ If the evidence shows willful mischief or gross negligence, or both, the jury may find such punitive or exemplary damages as the case justifies, otherwise not.⁶ Exemplary damages are proper where the evidence shows gross negligence or a wanton and reckless disposition on the part of its agents to injure or destroy the plaintiff's property.⁷ If the verdict is in excess of the real injury, it will be set aside.⁸ But *aliter* if it is only slightly in excess of the amount at which the court would have assessed the damages.⁹ Statutes allowing double damages against railroads for the killing of stock by failing to fence their tracks have been held constitutional,¹⁰ and, again, unconstitutional.¹¹ A statute rendering railroads liable for cattle killed by them, at a valuation to be conclusively fixed by appraisers, is uncon-

¹ Dean v. R. R. Co., 43 Wis. 305.

² Rockford etc. R. R. Co. v. Lynch, 67 Ill. 149.

³ Case v. R. R. Co., 75 Mo. 668.

⁴ Jackson v. R. R. Co., 74 Mo. 526.

⁵ Meyer v. R. R. Co., 64 Mo. 543; Dean v. R. R. Co., 43 Wis. 305; Toledo etc. R. R. Co. v. Johnston, 74 Ill. 83.

⁶ Vicksburg etc. R. R. Co. v. Paton, 31 Miss. 197; 66 Am. Dec. 552; Toledo etc. R. R. Co. v. Johnston, 74 Ill. 83.

⁷ Vicksburg etc. R. R. Co. v. Paton, 31 Miss. 156; 66 Am. Dec. 552.

⁸ Toledo etc. R. R. Co. v. Arnold, 43 Ill. 418.

⁹ Rockford etc. R. R. Co. v. Hefin, 65 Mo. 366.

¹⁰ Treadway v. R. R. Co., 43 Iowa, 527; Humes v. R. R. Co., 82 Mo. 221; 52 Am. Rep. 369; Mo. Pac. R. R. Co. v. Humes, 114 U. S. 512; Spealman v. R. R. Co., 71 Mo. 434.

¹¹ Atchison etc. R. R. Co. v. Baty, 6 Neb. 37; 29 Am. Rep. 356.

stitutional, as denying the right to a trial by jury.¹ An Illinois statute allowing the plaintiff to recover a reasonable attorney's fee for the prosecution of his suit against the company, in addition to the damages sustained, has been held valid.² A Kansas statute to the same effect has been sustained.³

¹ *Graves v. R. R. Co.*, 5 Mont. 556;
51 Am. Rep. 81.

² *Peoria etc. R. R. Co. v. Duggan*,
109 Ill. 537; 50 Am. Rep. 619.

³ *Kansas Pac. R. R. Co. v. Mower*,
16 Kan. 573; *Atchison etc. R. R. Co.*
v. Harper, 19 Kan. 529.

TITLE XVIII.
SHIPS AND SHIPPING.

TITLE XVIII.

SHIPS AND SHIPPING.

CHAPTER LXXVI

SHIPS AND SHIPPING.

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§ 1419. **Ships and Vessels — What are.**—Ships and vessels are personal property. In nautical language a ship is a particular kind of a three-masted vessel, but

in legal phraseology the word "ship" includes all kinds of vessels propelled with sails as well as with steam.¹ As used in different statutes, the following have been held to fall within the terms "ship or vessel": Any structure which is made to float upon the water for purposes of commerce or war, whether impelled by wind, steam, or oars;² the tackle, apparel, and furniture of a ship and its appurtenances necessary for a voyage;³ a floating elevator.⁴ And the following have been held not within the phrase, viz.: An open boat;⁵ a ferry-boat;⁶ a canal-boat;⁷ coal-barges or flat-boats, used to transport goods down a river, and sold for lumber at their destination;⁸ sea-stores in a vessel;⁹ small undecked boats, which do not go out of sight of land;¹⁰ and fishing-vessels.¹¹

§ 1420. Title in Ships — How Acquired — Bills of Sale — Registration. — The title to a ship may be acquired by building it or by purchase. Like other chattels, it goes, on the death of the owner, to his administrator, as in the case of personal property in general; but, unlike other chattels, it cannot be transferred by mere delivery, to give the purchaser a good title. By the United States statute¹² it is declared that no bill of sale, mortgage, hypothecation, or conveyance of a vessel of the United States, in whole or in part, shall be valid against any other, except the grantor or mortgagor, his heirs and devisees, and persons having actual notice, unless the instrument be recorded at the office of the collector of customs.¹³ A bill of sale

¹ The *Kosciusko*, 11 N. Y. Leg. Obs. 38.

² *Chaffe v. Ludeling*, 27 La. Ann. 607.

³ The *Ontario*, 2 Lowell, 40; *Swift v. Brownell*, 1 Holmes, 467.

⁴ The *Hezekiah Baldwin*, 8 Ben. 556.

⁵ *United States v. An Open Boat*, 5 Mason, 120.

⁶ *Birkbeck v. Hoboken Ferry Boats*, 17 Johns. 54.

⁷ *Many v. Noyes*, 5 Hill, 34; *Hicks v. Williams*, 17 Barb. 523.

⁸ *Jones v. Coal Barges*, 3 Wall. Jr. 53.

⁹ *Swift v. Brownell*, 1 Holmes, 467.

¹⁰ *Farmer's Delight v. Lawrence*, 5 Wend. 564.

¹¹ *Simpson v. Story*, 145 Mass. 497; 1 Am. St. Rep. 480.

¹² 9 U. S. Stats. 440, c. 27; U. S. Rev. Stats., secs. 4131-4196.

¹³ See *Bofinger v. United States*, 18 Ct. of Cl. 48; *The Superior*, 5 Saw. 83.

of the vessel and cargo while at sea is valid, provided the vendee takes possession without delay upon its arrival.¹ So of a mortgage.² The holders of a bill of sale of a vessel absolute on its face, but intended as a mortgage, may maintain an action for its conversion against a person claiming under a barratrous sale by the master, notwithstanding the fact that, on learning of the barratrous sale, they abandoned her to the underwriters, and received payment as on a total loss.³ Where a vessel is built for a certain price, and payments are made on installments as the work progresses, and the work is done under the superintendence of the orderer, the property in the vessel, it is held in England, is in the orderer.⁴ This doctrine is followed in some of the states.⁵ Others, however, hold that in such cases the property in the vessel remains in the builder until it is completed and delivered.⁶

Every vessel in the United States which is afloat is bound to have with her from the officers of her home port either a register or an enrollment. The former is used when she is engaged in a foreign voyage or trade; and the latter when she is engaged in domestic commerce, usually called the coasting trade. If found afloat, whether by steam or sail, without one or the other of these, and without the right one with reference to the trade she is engaged in or the place where she is found, she is not entitled to protection under the laws of the United States,

¹ *Portland Bank v. Stacey*, 4 Mass. 661; 3 Am. Dec. 253; *Southern Bank v. Wood*, 14 La. Ann. 554; 74 Am. Dec. 446. Where a vessel is sold to be delivered to the buyer in a certain city, and the buyer does not designate a particular place for delivery, the seller may tender a delivery at safe anchorage in the harbor. He is not called upon to place the vessel in a dry-dock, that the purchaser may there examine her: *Lincoln v. Gallagher*, 79 Me. 189.

² *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151; *Taber v. Hamlin*, 97 Mass. 489; 93 Am. Dec. 113.

³ *Clark v. Wilson*, 103 Mass. 219; 4 Am. Rep. 532.

⁴ *Woods v. Russell*, 5 Barn. & Ald. 942; *Clarke v. Spence*, 4 Ad. & E. 468.

⁵ *Derbyshire's Estate*, 11 Phila. 627; 81 Pa. St. 18; *Scudder v. Calais Steamboat Co.*, 1 Cliff. 370; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522.

⁶ *Merritt v. Johnson*, 7 Johns. 473; 5 Am. Dec. 289; *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55; *People v. Commissioners of Taxes*, 58 N. Y. 242; *Elliott v. Edwards*, 35 N. J. L. 265; 36 N. J. L. 449; *Williams v. Jackman*, 16 Gray, 514; *Briggs v. A Light Boat*, 7 Allen, 287.

but is liable to seizure for such violation of the law; and in a foreign jurisdiction or on the high seas can claim no rights as an American vessel.¹

§ 1421. **Mortgage of Vessel.**—A mortgage duly registered at the home port gives the mortgage priority over subsequent mortgagees or purchasers, notwithstanding conflicting state laws,² and is superior to a subsequent attachment under a state law.³ A mortgage recorded in the collector's office as required by the federal statute is valid, although the state law is not complied with.⁴ When the mortgage is not recorded, it is still valid as as between the parties and persons having actual notice.⁵ The mortgagee of a boat who allows the owner to use it for general freighting purposes subordinates his lien to the ordinary obligations incurred through the contracts of the master.⁶

§ 1422. **Part Owners—Rights and Liabilities.**—Each part owner of a ship is liable *in solido* to third persons for all debts, without regard to the proportions of their interests or any agreements between themselves. A court of equity, however, as between them, will distribute the liability ratably.⁷ Part owners of a ship are tenants in common, not joint tenants,⁸ but as to the earnings of the vessel they are partners,⁹ and are entitled to equitable relief as partners.¹⁰ The owners of a majority of interest

¹ Badger v. Gutierrez, 111 U. S. 734.

² White's Bank v. Smith, 7 Wall. 646.

³ Aldrich v. Aetna Co., 8 Wall. 491.

⁴ Folger v. Weber, 16 Hun, 512; Lawrence v. Hodges, 92 N. C. 672; 53 Am. Rep. 436.

⁵ Moore v. Simonds, 100 U. S. 145.

⁶ The E. M. McChesney, 8 Ben. 150.

⁷ Schermerhorn v. Loines, 7 Johns. 311; Parsons on Shipping, 100; Muldon v. Whitlock, 1 Cow. 290; 13 Am. Dec. 533; Gallitin v. The Pilot, 2 Wall. Jr. 292; Wilkins v. Reed, 6 Me. 220; 19

Am. Dec. 211; Jones v. Pitcher, 3 Stew. & P. 135; 24 Am. Dec. 716; Elder v. Larrabee, 45 Me. 590; 71 Am. Dec. 567; Robinson v. Stewart, 68 Me. 61.

⁸ Knox v. Campbell, 1 Pa. St. 366; 44 Am. Dec. 139; Milburn v. Guyther, 8 Gill, 92; 50 Am. Dec. 681; Hopkins v. Forsyth, 14 Pa. St. 34; 53 Am. Dec. 513; Elder v. Larrabee, 45 Me. 590; 71 Am. Dec. 567.

⁹ Donnell v. Walsh, 33 N. Y. 43; 88 Am. Dec. 361; and see note to this case, 88 Am. Dec. 364-368.

¹⁰ Endsor v. Simpson, 12 Phila. 392.

in a vessel have a right to control her and direct the manner of her employment.¹ One or more joint owners may maintain an action against the others to recover damages occasioned by their wrongful seizure thereof and consequent interruption of a voyage for which she was then under charter.² A part owner may commit barratry against the other owners.³ One joint owner in a home port cannot incur expenditures for repairs without the knowledge and consent of the others and recover from them their proportion of the expense.⁴ He is not entitled to her exclusive use without giving security to his co-owner.⁵ The general owners of a vessel are not liable for damages occasioned by a collision happening through the fault or negligence of the master of the vessel, who controls her *pro hac vice*, and is sailing her "on shares."⁶ Admiralty has jurisdiction to order the sale of a vessel on the application of the owners of one half of her, in case of a disagreement between them and the owners of the other half. But such disagreement must be such as prevents the present employment of the ship, and the owners asking for a sale must either propose a different employment of her; or if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds.⁷

§ 1423. **Bottomry—Respondentia.**—Bottomry is a contract in the nature of a mortgage entered into by the owner of a ship or his agent, whereby a loan of money is obtained on the ship alone, or with the freight, at an extraordinary interest, upon maritime risks to be borne by

¹ Gray v. Allen, 14 Ohio, 58; 45 Am. Dec. 523; Williams v. Ireland, 11 Phila. 273.

² Kellum v. Knechdt, 17 Hun, 583. And see Scull v. Raymond, 18 Fed. Rep. 547.

³ Phoenix Ins. Co. v. Moog, 78 Ala. 284; 56 Am. Rep. 31.

⁴ Benson v. Thompson, 27 Me. 470; 46 Am. Dec. 617.

⁵ Coyne v. Caples, 7 Saw. 360.

⁶ Somes v. White, 65 Me. 542; 20 Am. Rep. 718.

⁷ The Annie H. Smith, 10 Ben. 110.

the lender for a specific voyage or for a definite period.¹ If the ship completes her voyage safely, the lender receives back his money, with interest as agreed. If, however, the ship is lost by a peril of the sea, the lender is not repaid except to the extent of what is saved.² There is no personal responsibility in bottomry. The money must be advanced on the faith of the ship and at the sole risk of her loss or safety. So if by the terms of the contract the owner binds himself personally to repay the loan, it is not a bottomry loan;³ nor where collateral security is given for its absolute repayment, as where insurance policies and the vessel itself are assigned as security.⁴ So it is not bottomry if the money loaned is to be repaid at all hazards; for the principal and extraordinary interest reserved is not put absolutely at hazard by the perils of the voyage. The lender must run the maritime risk to earn the maritime interest.⁵ But if the ship is lost or injured by the fault or misconduct of the master or mariners, or of the owner, the borrower must return the sum borrowed, with interest.

The following items are not properly included in a bottomry bond: 1. The amount paid for old iron to be taken as freight, and the costs of a suit against the master of the vessel to recover the price of the old iron; 2. Money furnished to the master, but not proved to have been used for the ship, or loaned for the ship's use; 3. Items for personal expenses of the master for cab-hire and liquors; 4. Commissions on the obligee's own bill for supplies; 5. Cash for a set of scales, weights, and measures not shown to be necessary for the ship; 6. Items of luxuries

¹ *The Draco*, 2 Sum. 157; *Greeley v. Waterhouse*, 19 Me. 9; 36 Am. Dec. 730; *Braynard v. Hoppock*, 32 N. Y. 571; 88 Am. Dec. 349.

² *Northwestern Ins. Co. v. Ferward*, 36 N. Y. 139; *Bray v. Bates*, 9 Met. 237. Where the money is payable at all events, the instrument is not a bottomry bond. The money lent and

interest must be put at risk: *Jennings v. Ins. Co.*, 4 Binn. 244; 5 Am. Dec. 404.

³ *Braynard v. Hoppock*, 32 N. Y. 571; 88 Am. Dec. 549.

⁴ *Braynard v. Hoppock*, 32 N. Y. 571; 88 Am. Dec. 349.

⁵ *Braynard v. Hoppock*, 32 N. Y. 571; 88 Am. Dec. 349.

in the bill for supplies furnished by the obligee.¹ But the following are properly included: 1. Commissions for procuring freight; 2. Stevedore's bill for taking cargo on board; 3. Funeral expenses of former master who died while the ship was in port; 4. Advertising for a master, for bottomry and for bills against the ship; 5. For drawing the bottomry bond and stamps on it; 6. For a butcher's bill, the items of which were not given, but which were shown to be correct; 7. Expenses of survey and cost of repairs.²

The word "*respondentia*" was formerly applied to the hypothecation of the cargo or goods on board of a ship, in distinction to the pledging of its cargo, which was bottomry. But the latter word has come in modern times to be used to describe both transactions. Hence the term "*respondentia*" has fallen into disuse in the courts.³

ILLUSTRATIONS. — A vessel in a foreign port required repairs. The master was also the legal owner, but B, at the home port, held a mortgage on the vessel for more than her value. A knew this, and agreed to furnish the money necessary for the repairs and to accept drafts on B therefor. Just before the repairs were finished, A refused to do as agreed, and without communicating with B, insisted upon a bottomry bond at twenty per cent. *Held*, that the master had a right to give the bond, but that the twenty per cent should be disallowed: *The Archer*, 15 Fed. Rep. 276. A bottomry bond was given for repairs upon a vessel in Havana about to sail for England. The bond provided, "In case of loss of the brig, such an average as by custom shall have become due on the salvage." The vessel suffered damage by stress of weather, and was compelled to put into Charleston, where she was surveyed and the cost of the necessary repairs being deemed too high, she was sold. *Held*, that there was no loss, and that the lender was not bound to make any abatement from the amount of the bond: *The Unicorn*, 5 Hughes, 79.

§ 1424. The Master — His Duties, Rights, and Powers.

— The master is bound as to all with whom he deals to exercise reasonable care and prudence,⁴ and to receive the cargo and stow it properly.⁵ Officers of vessels of

¹ *The Edward Albro*, 10 Ben. 668.

⁴ *Purviance v. Angus*, 1 Dall. 184.

² *The Edward Albro*, 10 Ben. 668.

⁵ 1 Schouler on Personal Property,

³ *Rapalje and Lawrence's Law Dict.* sec. 311.
1117.

the United States are required to be citizens of the United States.¹ The master has a right to a certain percentage on the freight he carries over and above his wages, which is called *primage*,² and to carry a certain amount of goods on his own account,³ and to an extra allowance for services rendered out to the line of his duty, e. g., in painting the ship.⁴ On a general hiring for no particular voyage, the captain may be discharged at any time without assigning cause.⁵ A master who is also part owner does not by virtue thereof have a special privilege called or known as a sailing or master's interest which will prevent the owners of a majority interest in the vessel from displacing him as master at their pleasure.⁶ The wages of the master ceases when the voyage is interrupted by shipwreck; but he then becomes the agent of the owner to save and preserve the wreck, and may claim compensation as such.⁷

The powers of the master are first those of an agent with authority to bind his employers in all matters within the necessary scope of his authority,⁸ and the owner is liable for his torts within the scope of his employment.⁹ He has power to hire seamen for the voyage;¹⁰ to employ a pilot;¹¹ to purchase or contract for the fitting out, the victualing, and the repairing of the ship for the voyage.¹²

¹ Rev. Stats., sec. 4131; amended by act of June 26, 1884, c. 121, sec. 1; 23 Stats. 53.

² 2 Parsons on Shipping, 4, 5.

³ 2 Parsons on Shipping, 4, 5. He has no right to take his wife and child with him as guests: *Marshall v. Crawford*, 4 Saw. 37.

⁴ *String v. Hill*, Crabbe, 454.

⁵ *Montgomery v. Henry*, 1 Dall. 49; 1 Am. Dec. 223.

⁶ *Ward v. Ruckman*, 36 N. Y. 26; 93 Am. Dec. 479.

⁷ *McGilvery v. Stackpole*, 38 Me. 283; 61 Am. Dec. 245; *Duncan v. Reed*, 39 Me. 415; 63 Am. Dec. 635.

⁸ *The Tribune*, 3 Sum. 144; *Provost v. Patchin*, 9 N. Y. 239; *Jordan*

v. Young, 37 Me. 276; *Reynolds v. Toppan*, 15 Mass. 370; 8 Am. Dec. 110; *Swift v. Hall*, 121 Mass. 280; *Ward v. Green*, 6 Cow. 173; 16 Am. Dec. 437; *Calef v. The Bonaparte*, 1 Rob. (La.) 463; 38 Am. Dec. 190; *McLellan v. Cox*, 36 Me. 95; 58 Am. Dec. 736.

⁹ *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279.

¹⁰ He is personally liable for wages of a seaman earned while he is master, although the seaman was hired by the former master of the vessel: *Smith v. Oakes*, 141 Mass. 451; 55 Am. Rep. 487.

¹¹ *Hight v. Robbins*, 28 Mo. 168; 75 Am. Dec. 118.

¹² *Provost v. Patchin*, 9 N. Y. 239.

He has a right to imprison a sailor for disobedience or mutinous conduct.¹ But the master has no general power of buying and selling for the owner.² A master who has instructions to sell the cargo at the distant port has authority, if he cannot sell, to put it in the hands of an agent there to sell.³

ILLUSTRATIONS.—A vessel was arrested by process in admiralty, issued at the suit of the master and another person, and her voyage and employment interrupted until she was released by her owners. *Held*, that this act of the master terminated his employment: *Budge v. Mott*, 47 Wis. 611. The engineer of a tug-boat was injured by an explosion on the boat at the home port of Philadelphia. The officer in charge summoned a physician, who attended him on the boat and at his own house, whither he was carried at his own request. *Held*, that the owner was liable for the physician's services: *Holt v. Cummings*, 102 Pa. St. 212; 48 Am. Rep. 199.

§ 1425. In Cases of Necessity and Emergency.—In cases of necessity or emergency the master has a very wide authority.⁴ Thus when he is in a foreign port, and repairs to the ship become necessary, he may borrow money on the security of the ship, or even sell it if necessary.⁵ Under the same circumstances, he may sell part of the cargo to raise money for repairs⁶ or to prevent its loss.⁷ But if the necessity is not absolute, the sale by

¹ But only while aboard ship; he cannot imprison him on shore: *Buddington v. Smith*, 13 Conn. 334; 33 Am. Dec. 407. Officers of a steamboat have no right to beat a deck-hand, nor put him ashore for insufficiency at an exposed and inhospitable place: *Riley v. Allen*, 23 Fed. Rep. 46.

² *Newhall v. Dunlap*, 14 Me. 180; 31 Am. Dec. 45.

³ *Day v. Noble*, 2 Pick. 615; 13 Am. Dec. 463.

⁴ *Stearns v. Doe*, 12 Gray, 482; 74 Am. Dec. 608.

⁵ *Abbott on Shipping*, 150, 160; *Harned v. Churchman*, 4 La. Ann. 310; 50 Am. Dec. 573; *Rathbone v. Neal*, 4 La. Ann. 563; 50 Am. Dec. 579; *Prince v. Ins. Co.*, 40 Me. 481;

63 Am. Dec. 676; *Fitz v. The Amelia*, 2 Cliff. 444; *The Herald*, 8 Ben. 409.

⁶ *The Star of Hope*, 9 Wall. 203; *Benjamin on Sales*, sec. 18; *Gates v. Thompson*, 57 Me. 442; 99 Am. Dec. 782; *Stillman v. Hurd*, 10 Tex. 109; *Fontaine v. Ins. Co.*, 9 Johns. 30; *Jordan v. Ins. Co.*, 1 Story, 342; *Pope v. Nickerson*, 3 Story, 500; *The Packet*, 3 Mason, 255. The sale at a port of necessity of a part of the cargo for repairs does not create a lien on the ship: *Buchanan v. Ocean Ins. Co.*, 6 Cow. 330; *Am. Ins. Co. v. Chester*, 3 Paige, 332; *Depau v. Ocean Ins. Co.*, 5 Cow. 63; 15 Am. Dec. 431.

⁷ *Butler v. Murray*, 30 N. Y. 88; 86 Am. Dec. 355.

the master gives no title, though he acts *bona fide*.¹ The master may give a bottomry bond in a foreign port in a case of necessity.² If he has the means of doing so, and there is time to do it, he must communicate with the owners for instructions before selling the ship or cargo or executing a bottomry bond.³ "Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship."⁴

ILLUSTRATIONS.—A vessel in distress entered a port from which the cargo could have been reshipped in another vessel to the port of destination at a less expense than would cost for repairs. *Held*, that the master had no authority to pledge the cargo without consent of the shipper or consignee: *The Julia Blake*, 107 U. S. 418. A vessel bound from Rio de Janeiro to New York put into St. Thomas in distress. The master, to raise money to repair the vessel, gave a bottomry bond on vessel, freight, and cargo. He knew that C., at Philadelphia, was the consignee of the cargo, but made no communication to him or to the shipper, although he might have communicated with both by telegraph. *Held*, that the bond was void as to the cargo, as the master had no authority to give it: *The Julia Blake*, 16 Blatch. 472. Action by the owner of a cargo against the owners of a vessel to recover for the contributory share of certain jettisoned cargo and expenses chargeable to the vessel and freight for certain bottomry bonds. In a general-average contribution it appeared that, the vessel and freight being insufficient to meet this contribution, the cargo was taken for the payment of the deficiency, and the owner of the cargo claimed indemnity of the owners of the vessel. *Held*, that the owners of the vessel were not bound by the acts of the master, it being conceded that no prudent owner, if present, would have made or authorized such expensive repairs as were made by the master without any special authority: *Stirling v. Nevassa Phosphate Co.*, 35 Md. 128; 6 Am. Rep. 372.

¹ The *Joshua Barker*, Abb. Adm. Thompson, 57 Me. 442; 99 Am. Dec. 215; *Ins. Co. v. The Sarah Ann*, 13 Pet. 387; *Stillman v. Hurd*, 10 Tex. 109; *Ins. Co. v. Center*, 4 Wend. 45; *Hall v. Ins. Co.*, 9 Pick. 466; *Robinson v. Ins. Co.*, 17 Me. 131; 35 Am. Dec. 239; *Hassam v. Ins. Co.*, 7 La. Ann. 11; 56 Am. Dec. 591; *Gates v.*

Thompson, 57 Me. 442; 99 Am. Dec. 782.

² *Clark v. Laidlaw*, 4 Rob. (La.) 345; 39 Am. Dec. 526.

³ *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248; *The Amelia*, 6 Wall. 18; *The Guilio*, 27 Fed. Rep. 318.

⁴ *The Grapeshot*, 9 Wall. 129.

§ 1426. **Ship's Husband.**—The ship's husband is a person to whom the owner or owners of a ship delegate the management of her while she is at the home port. He is the general agent of the owners in regard to all the affairs of the ship while there, such as repairs, hiring officers and crew, affreightment, etc.¹ He has no authority to purchase a cargo on account of the owners.² A ship's husband being also part owner cannot by mere virtue of such relation bind the co-owners by obtaining bail for the release of the vessel from seizure under civil process for collision and for repair.³

§ 1427. **Supercargoes.**—Supercargoes are persons employed by commercial companies or private merchants to take charge of the cargoes they export to foreign countries, and to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. They usually go out with the ships on board of which the goods are embarked, and return home with them, and in this respect only differ from factors who reside abroad.⁴ Thus they are a class of factors, and are governed in their rights, responsibilities, and powers by the rules of law governing factors.⁵

§ 1428. **The Seamen — Rights and Duties of — Contracts with.**—The seamen on a ship are entitled to food of due quality and in sufficient quantity; they are entitled to care and medicine when they are sick or have been injured in the course of their duties.⁶ Statutes prescribe the form of contract which the owner or master may require the seaman to enter into, called the shipping

¹ Rapalje and Lawrence's Law Dict.; Gillespie v. Winberg, 4 Daly, 318.

² Hewett v. Buck, 17 Me. 147; 35 Am. Dec. 243.

³ Mitchell v. Chambers, 43 Mich. 150; 38 Am. Rep. 167.

⁴ Beawes's Lex Mercatoria, 47.

⁵ Story on Agency, sec. 33. As to,

the power and liabilities of factors, see Title I., Principal and Agent—Factors.

⁶ 2 Parsons on Shipping, 75-80; Peterson v. Swan, 50 N. Y. 46; Scarff v. Metcalf, 36 Hun, 202; 107 N. Y. 211; 1 Am. St. Rep. 807.

articles. And no stipulation is valid which is inconsistent with the statutory forms.¹ And outside of statutes, courts of admiralty require contracts tending to the disadvantage of a seaman to be strictly proved, and his assent strictly shown.² But the articles are conclusive evidence of the agreement.³

§ 1429. **Right to Wages.**—The seaman's compensation may come to him in various forms, according to the agreement he makes on the subject. Thus it may be that he receive a certain proportion of the freight earned; or that he receive a certain sum for the whole voyage; or that he share in the profits of the particular venture; or—and this is the most frequent mode—that he shall be paid a certain amount monthly for a certain period or until the end of the voyage.⁴ But freight is the mother of wages. Therefore, where the freight is lost by a disaster or peril arising from accident or superior force, the wages of the seamen are not recoverable,⁵ unless they save enough of the cargo to pay their wages,⁶ or unless the loss arise through the fault of the master or owner.⁷ Over the subject of seaman's wages the admiralty has an undisputed jurisdiction, *in rem* as well as *in personam*; and wherever the lien for the wages exists, will follow the ship into what hands soever she may come by title or purchase from the owner, and it will bind the freight also, if necessary, as against assignees with notice.⁸ Services rendered by a watchman on board a vessel while she lies

¹ Webb v. Duckingfield, 13 Johns. 390; 7 Am. Dec. 388. The statute has no application to contracts whereby fishermen ship for shares in the catch: The Cornelia M. Kingsland, 25 Fed. Rep. 856.

² The Sarah Jane, Blatchf. & H. 401.

³ Johnson v. Dalton, 1 Cow. 543; 13 Am. Dec. 564; The Triton, Blatchf. & H. 282; The Sarah Jane, Blatchf. & H. 401.

⁴ Schouler on Personal Property, 675.

sec. 315. The shipping articles control as to the amount of a mariner's wages: Johnson v. Dalton, 1 Cow. 543; 13 Am. Dec. 564.

⁵ Van Beuren v. Wilson, 9 Cow. 158; 18 Am. Dec. 491; Stark v. Mueller, 22 Fed. Rep. 447.

⁶ Daniels v. Ins. Co., 24 N. Y. 449.

⁷ Van Beuren v. Wilson, 9 Cow. 158; 18 Am. Dec. 491.

⁸ Sheppard v. Taylor, 5 Pet. Adm. 675.

in port are not maritime services, and the compensation for them is not recoverable in admiralty.¹

§ 1430. **What is and What is not a Forfeiture of Wages.**—The wages may be forfeited by the bad conduct of the seaman justifying his discharge;² or by his desertion after the vessel gets to port, but before it is unloaded;³ or during his term;⁴ or by his refusing to obey orders which will justify his discharge.⁵ But the following have been held not a good ground for not paying the wages of the seaman: Dismissal of the seaman without cause before the voyage begins;⁶ keeping him unemployed by reason of the ship being idle;⁷ impossibility of performance of his duties caused by sickness,⁸ or an injury;⁹ desertion caused by the cruelty or illegal act of the master.¹⁰

ILLUSTRATIONS. — A second mate, while reporting a seaman for disobedience, told the master that if the seaman was not discharged he himself would leave the ship. The master ordered the mate to go to his room, and to consider himself under arrest for mutinous language. *Held*, that the mate in leaving the ship forfeited all claim to wages due: *The Alvena*, 22 Fed. Rep. 861. Seamen, disagreeing with the master as to the amount of wages due them, were ordered to go to work or to go on shore. They agreed that if he would give them orders for their wages they would go ashore and regard themselves as discharged. He gave them the orders and they left the vessel. *Held*, that they were discharged, and were not deserters: *The Frank C. Barker*, 19 Fed. Rep. 332. The first engineer of a yacht in port was discharged in the middle of the month, without warning, for giving an insufficient excuse for not having ventilators cleaned as ordered. He at once drew the fires, although it was a cold winter's day, thus endangering the yacht,

¹ *McGinnis v. The Grand Turk*, 2 Pittsb. Rep. 326.

² Brightley's Federal Digest, tit. Seamen.

³ *Webb v. Duckingfield*, 13 Johns. 390; 7 Am. Dec. 388.

⁴ *Spencer v. Eustis*, 21 Me. 519; 38 Am. Dec. 277.

⁵ *Tios v. Radovich*, 10 La. Ann. 101; 63 Am. Dec. 593. See *The Superior*,

22 Fed. Rep. 927; *The Alps*, 19 Fed. Rep. 139.

⁶ *Parry v. The Peggy*, 2 Browne on Civil and Admiralty Law, 533.

⁷ *The Alanson Sumner*, 28 Fed. Rep. 670.

⁸ 2 Parsons on Shipping, 52, 53.

⁹ *The Pacific*, 23 Fed. Rep. 154.

¹⁰ 2 Parsons on Shipping, 52, 53; *The Two Fannys*, 28 Fed. Rep. 285.

and he induced the first and second assistant engineers, and all hands connected with his department, to leave the yacht at once. *Held*, that neither he nor the first or second assistant could recover pay after the date of leaving the yacht: *The Yosemite*, 18 Fed. Rep. 331.

§ 1431. **Pilots — Rights and Duties of.** — “The term ‘pilots’ is equally applicable to two classes of persons,—to those whose employment is to guide vessels in and out of ports, and to those who are intrusted with the management of the helm and the direction of the vessel on the voyage. To the first class, for the proper performance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents, and tides, and its bars, shoals, and rocks, and the various fluctuations and changes to which it is subject. To the second class, knowledge of an entirely different character is necessary.”¹ The former class of pilots has been the subject of statutory regulation in all the coast states and by the federal government.

§ 1432. **Liability for Repairs and Supplies.** — We have seen that the master has authority either at home or abroad to purchase supplies on the credit of the vessel. There is a lien on a vessel for supplies furnished it in a foreign port.² The port of a sister state is a foreign port.³ The home port of a vessel is where the owner is.⁴ The owner is not liable for supplies furnished after he has sold her, if she has passed from his possession and employment, although she is mortgaged to him and remains enrolled in his name.⁵ Nor is a mere mortgagee or pledgee liable for supplies.⁶ “A person may be the legal owner of a vessel and have her registered in his name without being liable for supplies on the order of the master; but

¹ *Pacific Mail S. S. Co. v. Joliffe*, 2 *v. The Loper*, Taney, 500; *Case v. Wall*, 450.

² *The Emily Souder*, 17 Wall. 666.

³ *Cohen v. Ins. Co.*, Dud. (S. C.) 147; 28 Am. Dec. 313.

⁴ 31 Am. Dec. 549.

⁵ *The May Bell*, 1 Saw. 135; *Pickell* 39 Am. Dec. 730.

⁶ *Brooks v. Bondsey*, 17 Pick. 441;

⁷ *Duff v. Bayard*, 4 Watts & S. 240;

the possession, control, and management of her, the right to direct her destination and receive her earnings, will fix his responsibility, whether he has the legal title or not.”¹ If the registered owner of a vessel appoints her master, with an agreement that the master is to have the entire control of the vessel, and victual and man her, and make contracts of affreightment, and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with the shippers who have no notice of the arrangement between the master and the owner.²

§ 1433. Employment of Ship — General Ship — Common Carriers. — The owners of a ship may use it for carrying for others, in which event they become carriers by water, and subject to the rules as to the liability of common carriers.³

§ 1434. Charter-party. — Instead of employing the ship to carry goods for others, it may be let out to others to be used by them. This may be done either by a letting of the ship alone, the hirer to provide all equipments for the voyage, or by letting its whole capacity only, the owner supplying the crew, and the hirer simply being entitled to the use of the vessel to himself alone for his freight. In either event, such a letting is accomplished by means of an instrument known as a charter-party. The owner of a vessel may lease it, give up all possession and control, reserving only rent, and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term.⁴ A master of a vessel becomes owner *pro hac vice*, and not a partner of the owner, where he sails her under a contract at the halves, he to

¹ *Lincoln v. Wright*, 23 Pa. St. 76; 62 Am. Dec. 316; *Ward v. Bodeman*, 1 Mo. App. 372.

² *Oakland Cotton Man. Co. v. Jennings*, 46 Cal. 175; 13 Am. Rep. 209.

³ See *post*, Title Bailments — Common Carriers.

⁴ *Adams v. Homeyer*, 45 Mo. 545; 100 Am. Dec. 391.

victual and man her, and the owner to have half of her earnings.¹ A vessel may be hired for a term by parol.² Where a vessel is hired without any limitation of time, it is a hiring for every voyage commenced before notice by the owner of his intention to abrogate it.³ The obligation is implied in a contract of hiring that the vessel is seaworthy and in fit condition to carry the particular cargo, and perform the service for which she is hired or engaged.⁴ But a warranty of seaworthiness does not arise where the owner is kept in ignorance of the vessel's destination, of the service in which she is to be engaged, and the use to which she is to be put, and where she is selected by the charterer upon an actual examination of her by agents and their favorable report.⁵ The master is the agent of the owner, who is liable for his acts, unless the whole outfit, master and seamen included, have been engaged by the charterer.⁶

The owner of a vessel which he has let to another for a voyage, the charter-party stipulating that the hirer is to have entire possession and control, is not liable for freight shipped on that voyage, nor for wages or supplies, unless he holds himself out to shippers as being interested.⁷

¹ *Bridges v. Iron Co.*, 57 Me. 543; 99 Am. Dec. 788.

² *Taggard v. Loring*, 16 Mass. 336; 8 Am. Dec. 140; *Thompson v. Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; *Muggridge v. Eveleth*, 9 Met. 236. A signal for a tow-boat and her arrival in response do not constitute a contract between the signaling vessel and the tow to be towed to her place of destination: *Clark v. Gifford*, 7 La. 524; 26 Am. Dec. 511. •

³ *Cutler v. Winsor*, 6 Pick. 335; 17 Am. Dec. 385.

⁴ *Wood v. The Wilmington*, 5 Hughes, 205; *Standard Sugar Ref. Co. v. The Centennial*, 2 Fed. Rep. 409; *The Regulus*, 18 Fed. Rep. 380; *Sumner v. Caswell*, 20 Fed. Rep. 249.

⁵ *Richardson v. United States*, 2 Ct. of Cl. 483.

⁶ *Purvis v. Tunno*, 1 Brev. 259; 2 Am. Dec. 664.

⁷ *Tuckerman v. Brown*, 17 Barb. 191; *Pitkin v. Brainerd*, 5 Conn. 451; 13 Am. Dec. 79; *First Nat. Bank v. Stewart*, 26 Mich. 83; *Baker v. Huckins*, 5 Gray, 196; *Thompson v. Snow*, 4 Me. 264; 16 Am. Dec. 263; *Giles v. Vigoreux*, 35 Me. 300; 58 Am. Dec. 704; *McLellan v. Cox*, 36 Me. 95; 58 Am. Dec. 737; *Holden v. French*, 68 Me. 241; *Sheriffs v. Pugh*, 22 Wis. 273; 94 Am. Dec. 600; *Leary v. U. S.*, 14 Wall. 607, the court saying: "There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party, considered in connection with the nature of the service rendered. The ques-

But the owners can be relieved by nothing short of an actual demise of the vessel such as takes from them all possession, authority, or control.¹

Demurrage is a sum of money due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party.² A consignee is not liable for demurrage if the bill of lading contains no provision for the payment thereof; and certainly not if he assigns the bill of lading before any cargo has been delivered.³ Demurrage cannot be recovered for an unreasonable delay to a vessel in discharging her cargo when such detention is caused by an accidental and unexpected accumulation of vessels at the same dock, where all must discharge and each in turn does discharge her cargo.⁴

ILLUSTRATIONS. — Defendant hired the plaintiff's barge, with captain and crew, for ten months, used her three months, and abandoned her at a dock, where she remained three months,

tion as to the character in which the charterer is to be treated is in all cases one of construction. If the charter-party let the entire vessel to the charterer, with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other, it is a contract for a special service to be rendered by the owner of the vessel. In examining the adjudged cases on this subject, we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used in the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no dif-

ference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time, of such special ownership in the charterer": *Christie v. Lewis*, 2 Brod. & B. 410, 434; *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 39, 49; *Schooner Volunteer and Cargo*, 1 Sum. 551, 556; *Drinkwater v. Freight and Cargo of Brig Spartan, Ware*, 149, 154; *Donahoe v. Kettell*, 1 Cliff. 135; *Holt on Shipping*, 461-471.

¹ *Scarff v. Metcalf*, 107 N. Y. 211; 1 Am. St. Rep. 807.

² *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 255.

³ *Gage v. Morse*, 12 Allen, 410; 90 Am. Dec. 155.

⁴ *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 256.

suffering from exposure. The plaintiff notified the defendant that unless he used the barge the plaintiff would do so for the rest of the term, crediting him with the net earnings. Defendant made no response. *Held*, that plaintiff could recover the amount unpaid on the contract, less such net earnings: *Johnson v. Meeker*, 96 N. Y. 93; 48 Am. Rep. 609.

§ 1435. **Collisions.**—For the avoidance of collisions between vessels, certain rules are established by usage and by statute which must be observed at the peril of the owners. If a collision occurs by failing to observe the rules as to navigation, the vessel in fault is liable for all the damages to both vessels;¹ if both vessels were in fault, the loss is apportioned between them;² if neither was in fault, the damage rests where it fell.³ To make navigation as safe as possible, uniform rules and regulations have been adopted by nearly all the maritime nations and have been sustained by the courts. Among these are the following:⁴ A vessel in motion must avoid one moored or anchored;⁵ a steam-vessel must alter her

¹ The *Carroll*, 8 Wall. 302; The *Clara*, 102 U. S. 200; The *Morgan v. The Zebra*, 2 Hughes, 64; The *Scranton v. Emerald Isle*, 2 Ben. 25; *Yates v. Brown*, 8 Pick. 23; The *Scioto*, Daveis, 539; *McCrary v. The Poulson*, 3 Hughes, 494; *Beyer v. The Nuremberg*, 3 Hughes, 505; The *Oler*, 2 Hughes, 12; *Knowlton v. Sanford*, 32 Me. 148; 52 Am. Dec. 649; *Duggins v. Watson*, 15 Ark. 118; 60 Am. Dec. 561; The *City of New York*, 15 Fed. Rep. 624.

² The *Grey Eagle*, 9 Wall. 505; The *Catherine*, 17 How. 170; The *Continental*, 14 Wall. 345; The *John Henry*, 3 Ware, 264; *Lane v. The Denike*, 3 Cliff. 117; *Boggs v. Parr*, 3 Hughes, 504; The *Constitution*, Gilp. 579; The *Brothers*, 2 Biss. 104; *Morrison v. The Petaluma*, 1 Saw. 126; The *Monticello*, 15 Fed. Rep. 474; The *City of Merida*, 24 Fed. Rep. 229; The *Stanford*, 27 Fed. Rep. 227; The *Columbia*, 27 Fed. Rep. 238; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 115; 91 Am. Dec. 378.

³ 1 *Parsons on Shipping*, 548; *Broadwell v. Swgert*, 7 B. Mon. 39; 45 Am.

Dec. 47; The *Clarita*, 23 Wall. 11; *Stamback v. Rae*, 14 How. 532; *Sturgis v. Boyer*, 24 How. 110; *Duggins v. Watson*, 15 Ark. 118; 60 Am. Dec. 560; *Barrett v. Williamson*, 4 McLean, 589; *Jerome v. Floating Dock*, 3 Hughes, 508; *Lucas v. The Swan*, 6 McLean, 282; *Fashion v. Wards*, 6 McLean, 152; The *Moxey*, Abb. Adm. 73.

⁴ For a full digest of the cases on this topic, see the note to *Baker v. Lewis*, 33 Pa. St. 301, in 75 Am. Dec. 598.

⁵ *Simpson v. Hand*, 6 Whart. 311; 36 Am. Dec. 231; *Knowlton v. Sanford*, 32 Me. 148; 52 Am. Dec. 649; *Baker v. Lewis*, 33 Pa. St. 301; 75 Am. Dec. 599; *Ginbert v. The George Bell*, 3 Hughes, 468; *Mills v. The Holmes*, 1 Bond, 352; The *Lady Franklin*, 2 Low. 220; The *Merrimac*, 14 Wall. 199; *Bill v. Smith*, 39 Conn. 206; *Mercer v. The Florida*, 3 Hughes, 488; *Commercial Co. v. Dutton*, 2 Cliff. 537; The *Palmetto*, 1 Biss. 140; The *Omega*, 13 Phila. 463; The *Rockaway*, 19 Fed. Rep. 449; The *Echo*, 19 Fed. Rep. 453.

course to avoid a sailing-vessel,¹ and must keep out of the way of barges propelled with oars.²

Though a steamship must keep out of the way of a sailing-vessel, yet it is the duty of the latter to hold her course,³ and not to luff, tack, or change her course at the time.⁴ A sailing-vessel having the wind free must keep out of the way of one close-hauled.⁵ And the vessel close-hauled must keep on her course, and not embarrass the one having the wind free in keeping out of her way.⁶ Where one vessel is overtaking another, the former must keep out of the way of the latter.⁷ But the vessel ahead must keep on her course, and not change it unnecessarily.⁸ The negligent vessel will be liable if the other sinks, although proper exertions on the part of her master and crew might have kept her afloat;⁹ nor is the weakness of the injured vessel a defense.¹⁰ But though one vessel is in fault, if the injured one could have avoided the collision by using ordinary care, the former will not be liable.¹¹

§ 1436. **Lights.** — At common law there was no rule of law requiring a vessel to carry a light, and whether

¹ *Saune v. Tourne*, 9 La. 428; 29 Am. Dec. 452; *The Benefactor*, 102 U. S. 214; *The Free State*, 91 U. S. 200; *Lord v. Hazeltine*, 67 Me. 399; *The Osprey*, 1 Sprague, 245; *The Favorite*, 10 Biss. 536; *The Illinois*, 103 U. S. 298; *The Cadiz*, 20 Fed. Rep. 157; *The New Orleans*, 8 Ben. 101; *The E. H. Coffin*, 16 Blatchf. 421.

² *Bigley v. Williams*, 80 Pa. St. 107. But not a row-boat: *Philadelphia etc. R. R. Co. v. Adams*, 89 Pa. St. 31; 33 Am. Rep. 721.

³ *The Gerard Stuyvesant*, 8 Ben. 183; *The Harrisburg*, 14 Phila. 499; *The Rescue*, 24 Fed. Rep. 44; *The Plymouth*, 26 Fed. Rep. 879; *The Carroll*, 8 Wall. 302; *The Scotia*, 14 Wall. 170; *The Free State*, 91 U. S. 200; *The Illinois*, 103 U. S. 298; *The R. B. Forbes*, 1 Sprague, 328.

⁴ *The Pilot*, 20 Fed. Rep. 80.

⁵ *The Blossom*, Olcott, 188; *The Argus*, Olcott, 304; *The John Stuart*,

4 Blatchf. 444; *The Osseo*, 16 Blatchf. 537; *St. John v. Paine*, 10 How. 557; *The Catherine v. Dickinson*, 17 How. 170; *The Erastus Wiman*, 20 Fed. Rep. 245.

⁶ *The Argus*, Olcott, 304; *The Jupiter*, 1 Ben. 536; *Allen v. Mackey*, 1 Sprague, 219; *The Mary Eveline*, 16 Wall. 348.

⁷ *Erwin v. Steamship Co.*, 88 N. Y. 184; *The Narragansett*, 10 Blatchf. 475; *The W. H. Clark*, 5 Biss. 295; *The Peter Ritter*, 14 Fed. Rep. 173.

⁸ *The Grace Girdler*, 7 Wall. 196; *The Ellen Holgate*, 13 Phila. 470.

⁹ *Phares v. Stewart*, 9 Port. 336; 33 Am. Dec. 317.

¹⁰ *Inman v. Funk*, 7 B. Mon. 538; 46 Am. Dec. 526; *Amoskeag Mfg. Co. v. The John Adams*, 1 Cliff. 419.

¹¹ *Carlisle v. Holton*, 3 La. Ann. 48; 48 Am. Dec. 440; *Reese v. The Mary Foley*, 6 La. Ann. 71; 54 Am. Dec. 537; *The Farmer v. McCraw*, 26 Ala. 189; 62 Am. Dec. 718.

the omission to have a light was negligence or not was a question of fact in each case.¹ But by statute it is now obligatory for all vessels to carry certain prescribed lights. The burden is upon libelants to show not only that their lights were burning, but also that the weather was such that they could be seen a sufficient distance to avoid the collision.² The fact that the side-lights of a sailing-vessel could have been seen by a careful lookout from a steamer will not excuse the former's neglect to exhibit a torch (as required by the United States Revised Statutes, section 4234), which might have prevented the collision.³ But a schooner failing to exhibit a lighted torch, as required by law, will not, because of the omission, be held chargeable with a collision which in no way resulted from such omission.⁴ So the omission to carry the lights prescribed by law does not of itself preclude a recovery for damages negligently and recklessly produced by another vessel running upon her or her tow.⁵ A vessel which by carrying a wrong light conveys the erroneous impression that she is at anchor is liable for a collision caused by her error.⁶ When a collision happens on a dark night between a steamer and a sailing-vessel, the mere fact of such collision raises no presumption of negligence against the steamer. But if such collision occurs in the daytime, and in good weather, it may be presumed that it was occasioned by her fault.⁷

§ 1437. **Watches and Lookouts.** — A vessel must keep a competent and vigilant lookout on the forward part of the vessel.⁸ But a lookout is not indispensable

¹ *Carsley v. White*, 21 Pick. 254; 32 Am. Dec. 259; *Rigers v. The St. Charles*, 19 How. 108; *The Santa Claus*, 1 Blatchf. 370. But see *Innis v. The Senator*, 1 Cal. 460; 54 Am. Dec. 305; *Simpson v. Hand*, 6 Whart. 311; 36 Am. Dec. 231, as to vessels moored "in harm's way." They should carry a light.

² *The Florence P. Hall*, 14 Fed. Rep. 408.

³ *The Algiers*, 21 Fed. Rep. 343.

⁴ *The C. Whiting*, 14 Phila. 566.

⁵ *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; 7 Am. Rep. 435.

⁶ *The Conoho*, 24 Fed. Rep. 758.

⁷ *Union Steamship Co. v. Nottingham*, 17 Gratt. 115; 91 Am. Dec. 378.

⁸ See cases cited in 75 Am. Dec. 605; *The Java*, 14 Blatchf. 524; *The New Orleans*, 106 U. S. 13.

where he could be of no service, or where the officer of the deck is in full possession of all the information which a lookout could give.¹ No lookout is required on the stern of a vessel,² except when a steamer is backing out of a slip.³

§ 1438. **Salvage—What the Subject of.**—Salvage is the compensation which the maritime law allows for services rendered in saving a ship or its cargo from peril.⁴ Where a vessel answers signals of distress, and goes to the assistance of the distressed ship, and supplies provisions, and carries an officer from her to a place where he can obtain assistance, the service is a salvage service.⁵ Property or a vessel not actually in peril, and saved from destruction or not abandoned, is not the subject of salvage;⁶ nor where the person claiming caused the peril, as where one vessel runs down another by its fault.⁷ Saving life without property gives no claim for salvage, though where both are present the former may enhance the amount which will be allowed.⁸ The interest of those who have acquired a claim *in rem* against a vessel for a collision is subject to the right and claim of her subsequent salvors.⁹

ILLUSTRATIONS. — A bark having been abandoned in the ice, some of the crew of a bark imbedded in the ice near by visited the abandoned bark to bring stores from her. The ice broke up, and prevented their return to their own vessel. With the aid of a third vessel the abandoned bark was saved. *Held*, that the service rendered by these men was a salvage service: *The Mabel*, 22 Fed. Rep. 543; 10 Saw. 501. A bark laden with cotton and anchored outside the bar took fire, and, as the only means of saving her, she was towed into shallow water and sunk by persons who were under no obligations to render such assistance. *Held*, that the proceeds of the sale of the hull and cargo were

¹ The *George Murray*, 22 Fed. Rep. 117.

² *Erwin v. S. S. Co.*, 23 Hun, 573; 88 N. Y. 184.

³ *The Nevada*, 17 Blatchf. 122; 106 U. S. 154; *The Kirkland*, 3 Hughes, 641.

⁴ *The Arendal*, 14 Fed. Rep. 580. The word is also applied to the prop-

erty which is saved from a wrecked vessel.

⁵ *The New Orleans*, 23 Fed. Rep. 909.

⁶ *Brightley's Federal Digest*, Salvage; *The Cleone*, 7 Saw. 77.

⁷ *Brightley's Federal Digest*, 749, 750.

⁸ *Brightley's Federal Digest*, 747.

⁹ *The Remnants of the Jeremiah*, 10 Ben. 338.

the measure of the property saved, and that salvage should be allowed on that basis: *The Cochrane*, 3 Woods, 304. A steamer disabled by the breaking of her propeller-shaft made signals of distress which were observed by another steamer, which took her in tow, and after towing her twelve hours, voluntarily cast off the hawser without communication with her, and under no stress of weather, and left her in no better position in any respect than when she found her. *Held*, neither a salvage nor a towage service for which any compensation should be made: *The Algitha*, 17 Fed. Rep. 551. A dry-dock moored to the bank of the Mississippi River was run into and a hole broken in its side. Certain tug-boats pumped it out, prevented it from sinking, and then libeled it for salvage. *Held*, that it was not a subject for salvage service: *Cope v. Vallette Dry-Dock Co.*, 16 Fed. Rep. 924.

§ 1439. **Who Entitled to Salvage.**—As a general rule, all persons who were not bound to render the service are entitled to salvage. The owner of a ship may claim compensation for services rendered by his ship, though he was not present at the time.¹ Seamen may, when their service was at the time at an end, and what they did was outside the line of their duty.² So may passengers;³ so may pilots⁴ and revenue officers;⁵ a corporation chartered for saving vessels;⁶ a fire department.⁷ A service is not the less a salvage service because the vessel to which aid was rendered might have escaped from her peril unaided.⁸ If part of a salvage service is performed by one set of salvors and is completed by another set, the first are entitled to salvage *pro tanto*, although they alone would not have saved the property.⁹ But as the claimant must not have been under a legal duty to perform the service, salvage cannot, as a rule, be claimed by the master or the crew of the saved vessel.¹⁰ Nor can a vessel by a breach

¹ *The Camanche*, 8 Wall. 448.

² *Mason v. Blaireau*, 2 Cranch, 240; *The Florence*, 20 Eng. L. & Eq. 607.

³ 2 Parsons on Shipping, 268.

⁴ 2 Parsons on Shipping, 268.

⁵ 2 Parsons on Shipping, 272.

⁶ *The Camanche*, 8 Wall. 448.

⁷ *The Blackwall*, 10 Wall. 1.

⁸ *The Mary E. Long*, 14 Phila. 598.

⁹ *In re Raft of Timber*, 15 Fed. Rep. 555.

¹⁰ *Brightley's Federal Digest*, 749. The fact that both vessels belong to the same owner furnishes no ground of exemption to a claim for salvage compensation by the master and crew of the salvaging vessel: *The Colina*, 5 Saw. 181.

of a contract with another vessel put the latter in danger and peril;¹ nor for services rendered against the will and protest of the boat saved; nor where the labor, as, for instance, extinguishing a fire, was of no benefit.²

ILLUSTRATIONS.—A bark went ashore on Clatsop Beach, Oregon, in a thick fog, and was deserted by her crew and master, who, within two days, sold her for whom it might concern; but, meanwhile, she was taken possession of by M., who, with his skiff, proceeded to save her apparel and cargo. *Held*, that M. was entitled to maintain possession for purposes of salvage until, finding his means therefor ineffective, others offered to assist with better means, whereupon it was his duty to yield them possession: *The Cairnsmore*, 20 Fed. Rep. 519. A tug responding to the towage signal of a ship drifting in the vicinity of a conflagration caused by an exploded oil-tank, hailed the mate: "You tell the captain that I will take him out for one thousand dollars." The reply came back: "Give him a line." The line was made fast and the ship towed across the river. *Held*, a salvage, not a towage service: *The Young America*, 20 Fed. Rep. 926.

§ 1440. Amount of.—The general rule is to allow as salvage about one third of the value of the property saved.³

§ 1441. General Average.—General average is "a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to average are usually divided into two great classes: 1. Those which arise from sacrifices of part of the ship or part of the

¹ *The Krona*, 28 Fed. Rep. 318.

² *The Choteau*, 4 Woods, 71.

³ Brightley's Federal Digest, 752 et seq. See the following cases on this point: *The Cyclone*, 16 Fed.

Rep. 486; *The Neto*, 15 Fed. Rep. 819; *The Rialto*, 15 Fed. Rep. 124; *The Alaska*, 23 Fed. Rep. 597; *The Sybil*, 5 Hughes, 228; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 20 Blatchf. 557.

cargo purposely made in order to save the whole adventure from perishing; 2. Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.”¹ All property on board a vessel at the time of a jettison is liable to contribution, except that attached to the persons of the passengers.² And the property saved must contribute, though it is afterwards lost by another peril in the course of the voyage.³ Where a vessel is voluntarily stranded to save it, the damage to it is a general-average loss.⁴ So where there is a jettison, i. e., the throwing over of part of the goods to save the rest,⁵ or where masts, spars, and rigging have been cut away to save ship and cargo.⁶ So where a vessel is accidentally stranded, and by labor and expense is floated and completes her voyage.⁷

So where a vessel is obliged to put into a port of safety, the wages and provisions of the crew from the time she headed for that port until she sets out again on her original voyage are the subjects of general average.⁸ But where a vessel puts into a port of distress, and there transships a portion of her cargo, the freight paid the substituted bottom is not an expense or loss to be contributed for in general average, where the transshipment is made for the purpose of earning full freight.⁹ The sacrifice or exposure to

¹ *The Star of Hope*, 9 Wall. 203; *Teetzman v. Clamageran*, 2 La. 195; 22 Am. Dec. 127. See Title Insurance, *post*, Marine Insurance.

² *Harris v. Moody*, 30 N. Y. 266; 86 Am. Dec. 375.

³ *Scudder v. Bradford*, 14 Pick. 13; 25 Am. Dec. 355.

⁴ *The Star of Hope*, 9 Wall. 203; *O'Connor v. The Ocean Star*, 1 Holmes, 248; *Fowler v. Rathbones*, 12 Wall. 102; *Patten v. Darling*, 1 Cliff. 254; *Fitzpatrick v. Bales of Cotton*, 3 Ben. 42; *Gray v. Waln*, 2 Serg. & R. 229; 7 Am. Dec. 643; *Columbian Ins. Co. v. Ashby*, 13 Pet. 343; *Bevan v. Bank*, 4 Whart. 301; 33 Am. Dec. 64.

⁵ *Maggrath v. Church*, 1 Caines, 196; 2 Am. Dec. 173.

⁶ *The Mary Gibbs*, 22 Fed. Rep. 463.

⁷ *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1; 13 Am. Dec. 388.

⁸ *Walden v. Leroy*, 2 Caines, 263; 2 Am. Dec. 236; *The Star of Hope*, 9 Wall. 236; *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; 5 Am. Dec. 339; *Hause v. Ins. Co.*, 10 La. 1; 29 Am. Dec. 456; *Barker v. R. R. Co.*, 22 Ohio St. 45; 10 Am. Rep. 726. And expenses of the crew in getting to and remaining at a port for repairs: *Union Ins. Co. v. Cole*, 18 Ill. App. 413.

⁹ *Hugg v. Baltimore etc. Mining Co.*, 35 Md. 414; 6 Am. Rep. 425.

danger must have been voluntary.¹ It must have been reasonably necessary.² It must have been for the common benefit.³ And the sacrifice must have been successful. If the loss was not averted, but merely delayed, there is no ground for general average.⁴ And there must have been at the time a possibility of saving the property.⁵ Thus where a vessel containing lime was scuttled to save it, it was held that, as the lime was of no value after it had been put in the water, it was not a case for general average.⁶ No contribution is allowed for goods shipped on deck and jettisoned.⁷ But the rule exempting deck cargoes from general average does not apply where a vessel is built with a view of carrying part of her cargo on deck, and, when so loaded by custom of trade, is compelled by a peril of the sea to jettison part of her deck-load.⁸ A general average fairly settled in a foreign port is conclusive.⁹ The master has a lien upon goods liable for contribution.¹⁰ It is a defense to an action on a general average bond that the loss was caused by the vessel being unseaworthy.¹¹

ILLUSTRATIONS. — A portion of a vessel's spars and sails were blown overboard by a gale, and lay alongside the vessel, pound-

¹ *The Star of Hope*, 9 Wall. 203; *Walker v. U. S. Ins. Co.*, 11 Serg. & R. 61; 14 Am. Dec. 610; *Rathbones v. Fowler*, 6 Blatchf. 294; 12 Wall. 102; *Crockett v. Dodge*, 12 Me. 190; 28 Am. Dec. 170; *Meech v. Robinson*, 4 Whart. 360; 34 Am. Dec. 514.

² *The Star of Hope*, 9 Wall. 203; *Walker v. U. S. Ins. Co.*, 11 Serg. & R. 61; 14 Am. Dec. 610; *Rathbones v. Fowler*, 6 Blatchf. 294; 12 Wall. 102; *Crockett v. Dodge*, 12 Me. 190; 28 Am. Dec. 170; *Meech v. Robinson*, 4 Whart. 360.

³ *Brightley's Federal Digest*, 67, 68.

⁴ *Scudder v. Bradford*, 14 Pick. 13; 25 Am. Dec. 355.

⁵ *Meech v. Robinson*, 4 Whart. 360; 34 Am. Dec. 514.

⁶ *Crockett v. Dodge*, 12 Me. 190; 28 Am. Dec. 170.

⁷ *Smith v. Wright*, 1 Caines, 43;

2 Am. Dec. 162; *Gillett v. Ellis*, 11 Ill. 579; *Dodge v. Bartol*, 5 Me. 286; 17 Am. Dec. 233; *The Rebecca*, 1 Ware, 211; *Lawrence v. Minturn*, 17 How. 114; *The Delaware*, 14 Wall. 604; *Cram v. Aiken*, 13 Me. 229; 29 Am. Dec. 503; *Doane v. Keating*, 12 Leigh, 391; 37 Am. Dec. 671; *Sproat v. Donnell*, 26 Me. 185; 45 Am. Dec. 103.

⁸ *The Hettie Ellis*, 20 Fed. Rep. 507; *Harris v. Moody*, 30 N. Y. 266; 86 Am. Dec. 375.

⁹ *Lewis v. Williams*, 1 Hall, 448; *Peters v. Ins. Co.*, 3 Sum. 393; 1 Story, 471; *Depau v. Ins. Co.*, 5 Cow. 63; 15 Am. Dec. 431.

¹⁰ *Chamberlin v. Reed*, 13 Me. 357; 29 Am. Dec. 506.

¹¹ *Cheraw etc. R. R. Co. v. Broadnax*, 109 Pa. St. 432; 58 Am. Rep. 733.

ing against her side, but secured to her by the rigging. The gale continuing, the spars were cut adrift in order to prevent them from pounding a hole in the vessel's side. *Held*, that the cargo must contribute to the loss sustained by their sacrifice: *The Margarethe Blanca*, 14 Fed. Rep. 59. A bark, being in inevitable danger, without her fault, of collision with a steamer, changed her course so as to strike the steamer stem on, thereby probably saving herself from being sunk with her cargo. In consequence of the collision, she was obliged to go for repairs into port of a country where the duty of a steamer to keep out of the way of a sailing-vessel was not recognized, and where she was compelled, at the suit of the owner of the steamer, by a decree of court, to bear half the damage to both vessels, and therefore to pay a certain sum to the steamer. In a suit in equity by the owner of the bark against the owners of her cargo for contribution, *held*, that neither the expenses of the repairs rendered necessary by the collision, nor the sum paid to the steamer, nor the costs of defending the suit, was a subject for general average: *Emrey v. Huntington*, 109 Mass. 431; 12 Am. Rep. 725. A fire in a vessel at a city wharf is extinguished by the city fire department, acting under municipal authority, and not at the request or direction of the ship-master. *Held*, that the cargo saved is not liable to contribute to a general-average loss: *Wamsutta Mills v. Old Colony Stbt. Co.*, 137 Mass. 471; 50 Am. Rep. 325.

· § 1442. **The Admiralty Jurisdiction.**—The maritime law is operative in any country so far only as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient; or like the adoption of the common law by the several states of the Union, which is the basis of the state laws, but is modified as each sees fit. Each sovereign power adopts the maritime law, not as a code having any independent or inherent force *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in

each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law; and it can have the effect of law in any country so far only as it is permitted to have.¹ The admiralty jurisdiction of the United States courts extends not only over the ocean, and where the tide ebbs and flows,—as was the English law,—but includes all the waters of the United States which are actually navigable, whether so by nature or by artificial improvement.² By the federal judiciary act, it is provided that the district courts of the United States “shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.”³ State courts have no jurisdiction of an action against a vessel by name.⁴ As to the concurrent jurisdiction of the state courts, the rule is, that they may exercise it in cases of which the cognizance was concurrent in the courts of common law previous to the constitution;⁵ and the enforcement of a lien created by state laws for labor performed and materials furnished in building vessels belongs exclusively to state tribunals.⁶ A state court may take cognizance of a suit against a master and owner of a vessel, where it is brought under a state statute, by action *in personam* and for sequestration, to enforce a claim secured by lien not created by maritime law, and not exclusively within the jurisdiction of an

¹ The Lottawanna, 21 Wall. 558.

² Waring v. Clarke, 5 How. 441; The Genessee Chief v. Fitzhugh, 12 How. 443; Jackson v. James, 20 How. 296.

³ U. S. Rev. Stats., sec. 563; Walters v. The Mollie Dozier, 24 Iowa, 192; 95 Am. Dec. 722; Phegley v. The David Tatum, 33 Mo. 461; 84 Am. Dec. 57; The Hine v. Trevor, 4 Wall. 555; McAllister v. The Sam Kirkham, 1 Bond, 369; The Norfolk, 2 Hughes, 123.

⁴ Griswold v. Steamboat Otter, 12 Minn. 465; 93 Am. Dec. 239.

⁵ The Isabella, Brown Adm. 96.

⁶ Randall v. Roche, 30 N. J. L. 220; 82 Am. Dec. 233; Thorson v. Schooner J. B. Martin, 26 Wis. 488; 7 Am. Rep. 91; Foster v. Richard Busteed, 100 Mass. 409; 1 Am. Rep. 125; Shepard v. Steele, 43 N. Y. 52; 3 Am. Rep. 660; Sinton v. Steamboat Roberts, 34 Ind. 448; 7 Am. Rep. 229; Scow Tuttle v. Buck, 23 Ohio St. 565; 13 Am. Rep. 270.

admiralty court.¹ As to the subject-matter of admiralty jurisdiction, the admiralty jurisdiction extends "to all contracts, claims, and services essentially maritime, amongst which are bottomry bonds, contracts of affreightment, and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels damaged by the perils of the sea, the claims of material-men and others for the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners; and also to civil marine torts and injuries, among which are assaults and other personal injuries, collision, spoliation, and damage, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from the owners of ships, controversies between the part owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance."²

ILLUSTRATIONS. — Plaintiff's property was injured through defendant's negligence while the latter was transporting it across the St. Lawrence River. *Held*, that a state court had jurisdiction of the action: *Baird v. Daly*, 57 N. Y. 236; 15 Am. Rep. 488. An attachment was issued against a vessel navigating the Yazoo and Mississippi rivers, to recover for repairs. These rivers were navigable by vessels of ten tons burden and upwards from the sea. The vessel was a steamboat owned and having her home port in Mississippi. *Held*, that the vessel was within the maritime jurisdiction of the United States; that the state courts had no jurisdiction of the subject-matter, and could not be invested with such jurisdiction by the legislature of the state: *Dever v. Steamboat Hope*, 42 Miss. 715; 2 Am. Rep. 643.

§ 1443. **Jurisdiction — Torts on the High Seas.** — The courts of this country have jurisdiction in cases of torts committed on the high seas, even on board a foreign vessel and between citizens of foreign countries.³ But in

¹ *State v. Voorhies*, 39 La. Ann. 499; 4 Am. St. Rep. 274.

² Mr. Justice Clifford, in *Ex parte Easton*, 95 U. S. 72. See note to *Keating v. Stone*, 3 Ohio St. 105, in 62 Am. Dec. 234-246.

³ *Percival v. Hickey*, 18 Johns. 257; 9 Am. Dec. 210; *Johnson v. Dalton*, 1 Cow. 543; 13 Am. Dec. 564; *The Pacific*, Blatchf. & H. 187; *Davis v. Leslie*, 1 Abb. Adm. 183.

case of foreigners, the jurisdiction is discretionary, and our courts may remit them to their own tribunals.¹ A proceeding *in rem* against a vessel for the recovery of damages for a maritime tort can be enforced only by the courts of the United States.²

¹ *Mason v. Blaireau*, 2 Cranch, 240; ² *Young v. Ship Princess Royal*, 22 *Gardner v. Thomas*, 14 Johns. 136; 7 *La. Ann.* 388; 2 *Am. Rep.* 731. *Am. Dec.* 445.

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